VOL. 41 (2d Series) JULY 6, 1973 No. 4

FEDERAL COMMUNICATIONS COMMISSION REPORTS
(41 F.C.C. 2d)

Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States

VOLUME 41 (2d Series)

Pages 383 to 584

Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

DEAN BURCH, Chairman

ROBERT E. LEE
NICHOLAS JOHNSON
H. REX LEE
CHARLOTTE T. REID
RICHARD E. WILEY
BENJAMIN L. HOOKS

UNITED STATES GOVERNMENT PRINTING OFFICE • WASHINGTON, D.C.

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402 - on a subscription basis

INDEX

	Page
Aeronautical Frequencies; file No. RM–1861 (F.C.C. 73–623)	383
Answer Iowa, Inc., et al.; docket No. 19760 et al. (F.C.C. 73–602)	384
A.T. & T.; docket No. 19129 (F.C.C. 71D–50)	389
A.T. & T.; docket No. 18128 et al. (F.C.C. 73–630)	450
A.T. & T.; et al. file No. S–C–L–46 et al. (F.C.C. 73–654)	451
A.T. & T.; et al. file No. S–C–L–44 et al. (F.C.C. 73–655)	454
A.T. & T.; docket No. 18128 et al. (F.C.C. 73–666)	457
A.T. & T.; docket No. 18128 et al. (F.C.C. 73–682)	460
Auburn Broadcasters, Inc.; forfeiture (F.C.C. 73–676)	462
Bandwidths available for intra-city stations; docket No. 19623 (F.C.C. 73–633)	464
Burns, Rieke, & Voss Associates et al.; docket No. 19596 et al. (F.C.C. 73R–229)	473
California Water & Telephone Co., et al.; docket No. 16928, et al. (F.C.C. 73–678)	479
Call signs, assignment of; docket No. 17477 (F.C.C. 73–677)	481
CATV Bureau Organization; amendment of part 0 (F.C.C. 73–652)	488
Communications Satellite Corp.; docket No. 16070 (F.C.C. 73–658)	490
Dupage County Broadcasting, Inc., et al.; docket No. 16965 et al. (F.C.C. 73–617)	495
FM table of assignments; docket No. 19413 (F.C.C. 73–670)	498
General Communications & Entertainment Co., Inc.; file No. CAC–109 (F.C.C. 73–632)	501
Gladdenbeck, Erwin, et al.; docket No. 19211 et al. (F.C.C. 73R–232)	504
Jackson, Phil D., et al.; docket No. 19294 et al. (F.C.C. 73R–190)	506
J. B. Broadcasting of Augusta, Ltd.; forfeiture (F.C.C. 73–643)	507
Key Broadcasting Corp. et al.; docket No. 19410 et al. (F.C.C. 73R–230)	510
Meredith Colon Johnston et al.; docket No. 18487 et al. (F.C.C. 73–618)	512
Office of Plans and Policy; amendment of part 0 (F.C.C. 73–660)	516
Prime time—notice of oral argument; docket No. 19622 (F.C.C. 73–657)	518
Prosser-Grandview Broadcasters, Inc., et al.; docket No. 19655 et al. (F.C.C. 73R–231)	520
Radioteleprinter Services; docket No. 19670 (F.C.C. 73–619)	523
Sammons Communications, Inc.; file No. CAC–677 et al. (F.C.C. 73–634)	526
South Jones Broadcasters, Inc.; docket No. 19416 (F.C.C. 73D–19)	530
Stereophonic Broadcasting; docket No. 19571 (F.C.C. 73–680)	534
Town Radio, Inc.; docket No. 19040 (F.C.C. 73R–234)	541
Tri-State Broadcasting Co.; application for construction permit (F.C.C. 73–669)	543
U.S. vessels—*Albatross* and *Sea Hawk;* file No. X–1138 et al. (F.C.C. 73–622)	547
Voice of Dixie, Inc., et al.; docket No. 18664 et al. (F.C.C. 73R–201)	550
Voice of Dixie, Inc., et al.; docket No. 18664 et al. (F.C.C. 71D–63)	560
Western Communications, Inc., et al.; docket No. 19519 et al. (F.C.C. 73R–233)	581

F.C.C. 73-623

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 2 AND 87 TO PROVIDE FOR AERONAUTICAL OPERATIONAL CONTROL COMMUNICATIONS IN THE BAND 1535–1660 MHz.	RM 1861

ORDER

(Adopted June 13, 1973; Released June 19, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. A petition for rule making has been filed by Aeronautical Radio, Inc. (ARINC).

2. By its petition, ARINC seeks to have 8 MHz of the UHF Aeronautical Mobile (R) Satellite bands (1543.5–1558.5 and 1645–1660 MHz) assigned to the Aeronautical Enroute Service.

3. No technical specifications for or design of a satellite to operate in the subject band currently exist. Consequently, the Commission has no facts to act favorably on the petition. The use of aeronautical mobile (R) frequencies for satellite purposes will certainly be subject to Commission proceedings when a formal system proposal is developed. The capability of the proposed system to satisfy the requirements of non-government users, including operational control needs, can more appropriately be considered in that context.

4. Accordingly, IT IS ORDERED, that the petition for rule making filed by Aeronautical Radio, Inc. in RM 1861, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-602

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ANSWER IOWA, INC., CEDAR RAPIDS, IOWA	Docket No. 19760 File No. 4724-C2-P-70
MANPOWER, INC. OF CEDAR RAPIDS, CEDAR RAPIDS, IOWA For Construction Permits To Establish new Facilities in the Domestic Public Land Mobile Radio Service	Docket No. 19761 File No. 3413-C2-P-70

MEMORANDUM OPINION AND ORDER

(Adopted June 6, 1973; Released June 12, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it for consideration the above-captioned applications to establish new one-way radio signalling stations to operate on 158.70 MHz in the Domestic Public Land Mobile Radio Service (DPLMRS) at Cedar Rapids, Iowa. The applications are mutually exclusive, because the grant of both to operate on the same radio channel and in the same locality would result in mutually harmful electrical interference. Since both applicants appear to be legally, financially, and otherwise qualified to construct and operate the proposed facilities, the applications must be designated for comparative hearing to determine which applicant is better qualified to operate the proposed facilities in the public interest. *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945).

2. It appears from the application of Answer Iowa, Inc. ("Answer Iowa") that it is an Iowa corporation, with its principal office located at 414 9th Street, Des Moines, Iowa. Answer Iowa is the licensee of two stations in Cedar Rapids, both operating in the DPLMRS: Stations KJU 810 and KAF 244. Both stations operate in the upper-VHF band and serve two-way mobile subscribers primarily, with one-way signalling provided on a secondary basis. As of December 31, 1972 Answer Iowa was serving 32 two-way mobile units through the two stations belonging to 25 subscribers, and 89 one-way signalling units belonging to 69 subscribers (Answer Iowa Annual Report (Form L) for 1972, filed April 27, 1973). Answer Iowa's Combined Annual Report (Form L) for all its stations in Iowa and Minnesota describes in its Condensed Balance Sheet assets of $1,338,435 with an Earned Surplus of $236,037. Construction costs proposed in the instant Answer Iowa application are $3,150. Answer Iowa, therefore, appears

to be financially qualified to construct its proposed station. The control point for the proposed station will be collocated with the control point for its presently authorized facilities in Cedar Rapids. The stockholders of Answer Iowa appearing to own 10%, or more, of the stock are: Russel W. Wolf (17.69%), J. Paul Strother (15.31%), James Russel Day (12.51%), and Roger Lund (12.10%). All of the foregoing reside in Ottumwa, Iowa.

3. In reply to a Commission staff letter dated August 30, 1972 Answer Iowa submitted a need showing for the one-way signalling channel by letter dated November 7, 1972. Answer Iowa proposes to set aside 400 paging codes to be used by its one-way subscribers not only in Cedar Rapids, but in Des Moines, Sioux City, Waterloo, Clinton, Marshalltown, Davenport, and Dubuque. In addition, it submits that there are significant delays in placing one-way signalling calls on its presently authorized channels, which serve two-way units primarily and one-way units on a secondary basis.

4. Answer Iowa's application states that the charges it proposes to make to the public are "on file" with the Commission. Under Section 21.15(a)(2) of our Rules when any qualifications have been established "reference thereto may be made by *specific identification*" (emphasis supplied). Answer Iowa's reference is not specific, and would require the submission of additional information pending further consideration of its application. Since this would unduly delay action on the competing application we would simply take this opportunity to remind applicants that the failure to submit pertinent information, not only unnecessarily delays staff action on applications, but can be the basis of adverse inferences drawn against the applicant. (See Rules, Section 21.20.) In any event, this matter will be considered under Issue 1.

5. Answer Iowa's antenna will be located on the same tower with Manpower's proposed antenna, but at a height 100 feet higher (or 419 feet above ground). Its transmitter will be a Motorola Type CC 3064 with 15F2 and 16F3 emissions, and input and output powers of 425 and 250 watts, respectively. Since there is nothing in the record to indicate that Answer Iowa is no longer technically qualified to operate its two-way stations in Cedar Rapids, we do not believe that any useful purpose would be served in further describing these qualifications here.

6. Manpower, Inc. of Cedar Rapids ("Manpower") is also an Iowa corporation, with its principal office located at 858 First Avenue, N.E., Cedar Rapids. All of the Manpower stock is owned by John J. Gavin, who operates a telephone answering service and temporary employment business at the principal office address. Manpower's balance sheet, dated June 30, 1969 shows a net worth of $53,985.17, with the cost of establishing its proposed facilities estimated to be $7,300.00.

7. Technically, Manpower proposes a Motorola Model CC 3040C base station transmitter with both 16F3 and 15F2 emission, to be located in Cedar Rapids. Input/Output powers will be 220 and 120 respectively, and the antenna will be located on an existing tower at a height of 300 feet above ground. Regular and emergency maintenance

of the system will be provided on a full time basis by Communications Engineering Company of Cedar Rapids, under the direction of Mr. Harlan Brummwell who holds a First Class Radiotelephone permit. Only authorized personnel will be permitted to service the radio equipment. All maintenance personnel will have access to the base station premises and the control point, which will be located at Manpower's principal office. All dispatching and managerial personnel will be instructed to report all service problems directly to Communications Engineering Co. shop and at Manpower's control point to replace paging units which go out of service for technical reasons.

8. Mr. Gavin who will devote at least 25 hours per week to the radio operation, once it is commenced, will be in complete charge of the entire operation. At least one dispatching operator will be devoted exclusively to the paging operation during each eight-hour shift; but more will be added, as necessary. Manpower proposes to render both tone-only and selective calling voice paging service in the Cedar Rapids area at the following rates:

Service:	*Monthly charge*
Rental of voice paging unit	$10.00
Rental of Tone-Only paging unit	8.00
Maintenance of leased paging unit	2.50
Maintenance of customer-owned paging unit (exclusive of cost of parts)	2.50
Message service:	
Voice paging unit—100 messages of up to 1-minute duration	15.00
Tone-Only unit—first 100 signallings	12.00

9. Manpower alleges a great need for one-way signalling service in the Cedar Rapids area, since no facility is now authorized to provide such service on a primary basis. Manpower has been conducting a telephone answering service in that area for a number of years and appears to be quite familiar with the area, through that activity and its temporary manpower service. It further alleges that it has received requests from its present telephone answering service subscribers and others for paging services. Based upon the requests and independent studies, it estimates that within the first six months of operation it will have fifty paging units in operation and within a year 100 units. On September 20, 1972, in response to a Commission request, Manpower submitted a list of 95 potential subscribers to its proposed one-way service. Manpower states that it also had letters from present Answering Service customers requesting one-way paging service; letters from former customers who left due to a lack of one-way paging service; and letters from potential subscribers for one-way paging service who were not then Telephone Answering Service customers. While the underlying documents themselves were not submitted to the Commission, Manpower stated that they could be inspected by Commission personnel at the office of Manpower's Washington attorney.

10. In a letter to the Commission dated January 11, 1971, Manpower stated its willingness to enter into a time-sharing agreement with Answer Iowa to resolve the frequency conflict involved in their mutually exclusive applications. Manpower also stated that it was directing its Washington counsel to begin negotiations with Answer Iowa to that end. The Answer Iowa file discloses no reference to a

sharing agreement, and so we infer that Answer Iowa has considered the matter, but has chosen not to enter into such an agreement with Manpower. We are of the view that Answer Iowa, if it has reached such a decision, might wish to reconsider its position, not only with the view of bringing this needed service into public use at the earliest date, but to avoid a costly and time-consuming hearing. Since we have already stated our position that time-sharing agreements are in the public interest, we do not believe that any useful purpose would be served by going into the matter at length again here.[1] Suffice it to say that the Manpower application has been pending since December 12, 1969 and the Answer Iowa application since February 19, 1970. Since the applications have been pending now for over three years, any further delay in the commencement of service to the public, in view of the availability of a time-sharing arrangement, would seem to require substantial justification. We are therefore authorizing and directing the presiding Administrative Law Judge, as we did in the *Ventura* matter, *supra*, to explore with the parties the possibility of resolving this matter without the necessity of hearing.

11. In view of the foregoing, IT IS ORDERED, That pursuant to Sections 309 (d) and (e) of the Communications Act of 1934, as amended (47 U.S.C. §§ 309 (d) and (e)) that the captioned applications of ANSWER IOWA, INC. and MANPOWER, INC. OF CEDAR RAPIDS are DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING upon the following issues:

1. To determine the nature and extent of services proposed by each applicant, including the rates, charges, personnel, practices, classifications, regulations, and facilities pertaining thereto.

2. To determine the total area and population to be served by Answer Iowa, Inc. within the 43 dbu contour of its proposed station, based upon the standards set forth in Section 21.504 of the FCC Rules and Regulations; and to determine the need for its proposed service in that area.[2]

3. To determine the total area and population to be served by Manpower, Inc. of Cedar Rapids within the 43 dbu contour of its proposed station, based upon the standards set forth in Section 21.504 of the FCC Rules and Regulations; and to determine the need for the proposed service in that area.[2]

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if either, of the above-captioned applicants would better serve the public interest, convenience and necessity.

12. IT IS FURTHER ORDERED, That the hearing shall be held at the Commission offices in Washington, D.C. at a time and place, and before an Administrative Law Judge, to be specified in a subsequent order.

13. IT IS FURTHER ORDERED, That the Burden of proof upon Issue 2 is upon Answer Iowa, Inc.; the burden of proof upon Issue 3 is upon Manpower, Inc. of Cedar Rapids; and the burden of proof upon Issues 1 and 4 is upon both applicants.

---

[1] An extended discussion of sharing agreements can be found in *Mobile Radio System of Ventura, Inc., et al.*, 30 FCC 2d 660 (1971).

[2] Section 21.504(a) of the Commission's Rules and Regulations describes a field strength contour of 43 decibels above one microvolt per meter as the limit of the reliable service area for base stations engaged in the one-way communications service. Propagation data set forth in Section 21.504(b) are a proper basis for establishing both the location of the service contours and the areas of harmful interference for the facilities involved in this proceeding.

14. IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau, is made a party to the proceeding.

15. IT IS FURTHER ORDERED, That the presiding Administrative Law Judge is AUTHORIZED AND DIRECTED to explore, together with the parties, the possibility of resolving this matter by the applicants entering into a time-sharing agreement for the use of the one-way channel sought by both applicants in this proceeding.

16. In the event that both applicants, after having been given an opportunity for full consideration, do not agree upon a time-sharing arrangement the Administrative Law Judge shall enter a memorandum in the record stating such to be a fact, together with a brief statement of the positions of the parties regarding such an agreement and IT IS FURTHER ORDERED, That the hearing proceed upon the above-stated issues.

17. IT IS FURTHER ORDERED, That applicants and party respondent may avail themselves an opportunity to be heard by filing with the Commission pursuant to Section 1.221(c) of the Commission's Rules within twenty days of the release date hereof, a written notice stating an intention to appear on the date set for the hearing and present evidence on the issues specified in this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 71D-50

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO. Charges for Interstate Telephone Service, A.T. & T. Transmittals Nos. 10989 and 11027	Docket No. 19129

APPEARANCES

On behalf of American Telephone & Telegraph Company and Associated Bell System Companies (AT&T), Messrs. *John F. Preston, Jr.*, *Howard Trienens*, *Harold Cohen*, *Thomas M. Eichenberger*, and *Jules Perlberg;* on behalf of GTE Service Corporation (for General Telephone and Electronics Corp.), Messrs. *John Robert Jones* and *William H. Schneider* (of Power, Jones, Bell & Schneider, Esqs., Columbus, Ohio), *Theodore F. Brophy* and *George E. Shertzer* (of New York, New York), and *William Malone*, Washington, D.C.; on behalf of United Utilities, Inc. and United Telephone System Companies, Messrs. *Lloyd D. Young* and *Warren E. Baker* (of Chadbourne, Parke, Whiteside & Wolff, Esqs., Washington, D.C.); on behalf of Microwave Communications, Inc. (MCI), Messrs. *Kenneth A. Cox*, *Michael H. Bader* and *William J. Byrnes* (of Haley, Bader & Potts, Esqs., Washington, D.C.); on behalf of Telephone Users Association, Inc., Messrs. *Aruthur S. Curtis* and *Mel Laney;* on behalf of the City of Chicago, Messrs. *Bernard Rane* and *Mark Goldstein*, Assistant Corporation Counsel for Mr. *Richard L. Curry*, Corporation Counsel, City of Chicago; on behalf of the Trial Staff, Common Carrier Bureau, Federal Communications Commission, Messrs. *Asher H. Ende*, *Peter M. Andersen*, *William L. Fishman* and *A. Michael Cappelletti;* on behalf of National Telephone Cooperative Association (NTCA), Mr. *Robert J. Leigh;* on behalf of the Secretary of Defense and all Executive Agencies of the United States Government, Messrs. *Curtis L. Wagner, Jr.* (Chief, Regulatory Law Division, Office of the Judge Advocate General, Department of the Army) and *Wolfgang Drescher* (of the Regulatory Law Division, Office of the Judge Advocate General, Department of the Army); on behalf of Data Transmission Company (DATRAN), Messrs. *John M. Scorce* (General Counsel), *Michael L. Glaser*, and *Francis E. Fletcher, Jr.;* on behalf of United States Independent Telephone Association (USITA), Mr. *Thomas J. O'Reilly;* on behalf of the Western Union Telegraph Company, Messrs. *Jack Werner*, *Robert N. Green* and *David H. Lubetsky;* on behalf of American Broadcasting Company, Inc. (ABC), Mr. *Robert J. Kaufman;* on behalf of Columbia Broadcasting System, Inc. (CBS), Mr. *Joseph DeFranco;* on behalf of National Broadcasting

Company, Inc. (NBC), Mr. *Howard Monderer;* on behalf of all three networks (ABC, CBS and NBC), Messrs. *Joseph M. Kittner, John L. Tierney* and *Norman P. Leventhal* (of McKenna & Wilkinson, Esqs., Washington, D.C.); on behalf of Atlantic Richfield Company, Messrs. *Alan Y. Naftalin* and *George V. Wheeler* (Koteen & Burt, Esq., Washington, D.C.); on behalf of National Retail Merchants Association, Inc. (NRMA), Messrs. *David L. Hill* and *William H. Borghesani, Jr.* (of Keller & Heckman, Esqs., Washington, D.C.); on behalf of the City of New York, Mr. *J. Lee Rankin*, Corporation Counsel by Mr. *Francis I. Howley*, Assistant Corporation Counsel; on behalf of Air Transport Association of America (ATA), Messrs. *James E. Landry* (General Counsel) and *William E. Miller* and *Herbert E. Forrest* (of Steptoe & Johnson, Washington, D.C.); on behalf of Aeronautical Radio, Inc., Messrs. *Donald C. Beelar, John L. Bartlett* and *Charles R. Cutler;* on behalf of American Telephone Consumers Council, Mr. *George Levine* and Mrs. *Eleanor Martell;* on behalf of Communications Workers of America, Mr. *Charles McDonald;* on behalf of The Public Service Commission of the State of West Virginia, Mr. *John E. Lee*, Chief Counsel; on behalf of Grass Roots Action, Inc., Messrs. *Richard Ottinger* and *Terry Lenzner;* on behalf of the State of New Jersey, Messrs. *Kenneth F. Yates*, Deputy Attorney General, *William E. McGlynn* and *Jack B. Kirsten* (Newark, New Jersey); and on behalf of the Commonwealth of Pennsylvania, Mr. *Gordon P. MacDougall*, Special Assistant Attorney General, Washington, D.C.

PHASE I INITIAL DECISION OF HEARING EXAMINER DAVID I. KRAUSHAAR (TO BE ASSOCIATED WITH 38 F.C.C. 2d 213)

(Issued August 23, 1971; Released August 30, 1971)

A. BACKGROUND AND INTRODUCTION

1. This proceeding is an investigation pursuant to Sections 201(b), 202(a), 204, 205 and 403 of the Communications Act of 1934, as amended, into the lawfulness of the charges of the American Telephone and Telegraph Company (AT&T) and the Associated Bell System Companies for interstate and foreign communications service. It was instituted by the Commission by its Order adopted January 20, 1971 (27 F.C.C. 2d 149) and by its Memorandum Opinion and Order adopted January 21, 1971 (27 F.C.C. 2d 151). AT&T and the Associated Bell System Companies were made parties Respondent.

2. On November 20, 1970, AT&T filed with the Commission Transmittal No. 10989, transmitting proposed tariff changes calling for increased rates and changes in the rate structure in the provision of Long Distance Message Telecommunications Services (MTS) under Tariff No. 263. This filing was designed to increase the Bell System's interstate rate of return to the 9½ percent level during 1971. Accompanying the transmittal, there were filed 17 statements of Company officials and outside consultants and 22 volumes of related data and workpapers in support of various aspects of the proposed rate increase. (27 F.C.C. 2d at 151–53.)

3. The tariff changes filed November 20, 1970, were scheduled to become effective on January 19, 1971. By letter, dated January 12, 1971, the Commission requested that AT&T voluntarily postpone the effective date of the tariffs as filed pending the outcome of an expedited hearing, and granted special permission to the Company to file revised tariffs providing for increases in MTS rates that will produce additional annual net earnings, before income taxes, of not more than $250 million. The Commission stated that such new rates would be suspended and would also be subject to accounting and refund by the carriers, pending a final determination by the Commission of the justness and reasonableness of the rates sought by AT&T.

4. By letter to the Commission dated January 13, 1971, AT&T acceded to the Commission's request to postpone the effective date of Transmittal No. 10989, pending the outcome of the expedited proceedings. On January 14, 1971, by Transmittal No. 11027, AT&T filed with the Commission revised tariffs to be effective January 21, 1971. The revised tariff changes provided for an increase in revenues of $175 million and associated cost savings of $75 million, for a total increase in net earnings before taxes of $250 million annually. (27 F.C.C. 2d at 151–55.)

5. On January 20, 1971, the Commission issued an Order (27 F.C.C. 2d 149), which suspended until January 26, 1971, the effectiveness of the tariff schedules filed under Transmittal No. 11027, instituted an investigation and hearing in a newly designed Docket No. 19129 as to the tariff schedules filed under Transmittal Nos. 10989 and 11027, and imposed an accounting and refund order requiring the carriers to maintain records of all amounts under the new schedules subject to such further disposition as the Commission may direct. On January 21, 1971, the Commission issued a Memorandum Opinion and Order (27 F.C.C. 2d 151) which set forth the procedures to be followed in the investigation of the tariff schedules, enumerated the issues to be considered in the proceeding, and acted upon petitions regarding the rate change.

6. For the purpose of expediting the hearing, the Commission ruled in its order instituting this proceeding that the first phase of the hearing (referred to elsewhere as Phase I) should be limited primarily to the rate of return issue. The Commission specified that, after the record has been completed on the rate of return issue, the parties may file proposed findings of fact and conclusions, whereupon an Initial Decision by the Examiner and a Final Decision by the Commission would be issued. The Commission declared that upon conclusion of the parties' participation in the rate of return phase, the remaining issues would be dealt with in the second phase of the proceeding. The Commission further ruled that at the end of Phase I, but before the resolution of the other issues, rate adjustments may be in order. The Commission also stated that any rate changes as may be authorized in its Final Decision in Phase I may be of an interim nature and may be accompanied by appropriate accounting and refund orders pending the outcome of the further hearings on questions related to ex-

penses, rate level and structure, and other associated matters. (27 F.C.C. 2d at 157.)[1]

7. During the prehearing conference, the Examiner ruled that Phase I of the proceeding would include an exploration of the issue as to whether "extraordinary items of expense" are included in the interstate operating results, such inquiry being limited to whether expenses incurred in connection with certain service problems are of such a nature as to make the interstate operating results for the test period non-representative for the future (T. 62–63, 86, 94). It was made clear that no question was being raised in Phase I with respect to the Bell System's rate base for its interstate operations, nor as to the reasonableness of interstate operating expenses, except as there may be included such extraordinary items as noted above (T. 54–56, 85–86, 3596, 4220).

8. In its Order of January 21, 1971, the Commission had specified that the issue of whether AT&T's additional revenue requirements should be met solely from the MTS category of service was to be determined in another proceeding, namely in the Docket No. 18128 proceeding, and not herein (27 F.C.C. 2d at 155–56). During the course of the hearings in Phase I, however, the Trial Staff filed a "Petition for Clarification" requesting that the Commission clarify or, if necessary, modify its recent rulings on the relationship of the separate proceedings in Docket Nos. 18128 and 19129 to permit the implementation of an interim decision in Phase I of this proceeding. The Trial Staff proposed, among other things, that any interim rate adjustments ordered by the Examiner at the conclusion of Phase I be effectuated by spreading the additional revenue requirements temporarily among all service categories proportionately with only such deviations as the evidence in the present docketed proceeding (Docket No. 19129) would show to be justified. Respondents opposed any modification of the issues set for hearing in Docket No. 19129, but proposed that: "when further increases are in order, Bell will consider increases on the non-MTS services and proposed such increases as would appear to be consistent with sound rate-making principles on an interim basis (Response to Petition for Clarification, p. 10)." In ruling upon the Trial Staff's petition, the Commission, by Memorandum Opinion and Order adopted June 24, 1971 (FCC 71–667), reaffirmed that Phase I herein is an expedited hearing "limited to a determination of the fair rate of return" (para. 2) and held that "there is no need for the Hearing Examiner or the Commission, in phase one of Docket No. 19129, to deal with any question of rate relationships, nor is there

[1] In its procedural order the Commission also provided that the Trial Staff of its Common Carrier Bureau "be separated both from the Commission and from the Examiner" (27 F.C.C. 2d at 157). Although this procedure was explicitly recognized by them as a beneficial departure from past Commission practice, the Respondents registered an objection, as they had in Docket No. 16258 and other Commission proceedings, to the participation of any member of the Common Carrier Bureau in the decisional process in the proceeding. Respondents contended that the participation of the other members of the Common Carrier Bureau should be subject to the same procedural requirements as apply to any other party, including restrictions as to *ex parte* presentations to the Commission and the Hearing Examiner (T. 99–101, 125–26). As a practical matter, the Hearing Examiner takes the opportunity to note for the record, thereby to inform the parties and the Commission, that no *ex parte* "presentations" to him of any kind have been made and that he has not discussed this case with any of the non-separated experts of the Common Carrier Bureau.

an occasion to consider any modification of the issues in Docket No. 19129" (para. 5). The Commission stated that in its judgment AT&T's proposal "presents a reasonable resolution to the question before us" and that "after issuance of its decision on the first phase of Docket No. 19129, [the Commission] will expect AT&T to propose an appropriate rate adjustment for its interstate services, which would, of course, be reviewed and made subject to an accounting order and possible refund as may be found justified in the final decision in Docket No. 18128" (para. 4).

9. The Commission's January 21, 1971 Order named as parties to this proceeding the American Telephone and Telegraph Company and the Associated Bell System Companies (AT&T) and the Common Carrier Bureau as represented by its Trial Staff. In advance, it also granted leave to intervene as parties, upon the filing of a notice of appearance within 15 days from the date of the Order's publication in the Federal Register, to the following:

Any connecting or concurring carrier.
General Telephone and Electronics Corporation.
United Utilities, Inc.
Anthony Martin-Trigona.
Microwave Communications, Inc. (MCI).
Silver Beehive Telephone Company.
The Telephone Users Association.
City of Chicago.

The Order also prescribed that any other interested party wishing to intervene may do so by filing a petition for leave to intervene pursuant to Rule 1.223(b), "but no later than *15* days after the publication hereof in the FEDERAL REGISTER."

10. In view of the lack of any objections or oppositions to the respective petitions they had filed, the following parties were granted leave to intervene by Order released February 22, 1971 (FCC 71M-281):

National Telephone Cooperative Association (NTCA).
The Secretary of Defense and the Executive Agencies of the United States Government.
The City of Los Angeles.
Data Transmission Company (DATRAN).
United States Independent Telephone Association (USITA).
The Western Union Telegraph Company.
GTE Service Corporation (as a substitute for General Telephone and Electronics Corporation, *supra*).
Utility Users League.
ABC, CBS and NBC Networks.
Atlantic Richfield Company.
National Retail Merchants Association, Inc. (NRMA).
City of New York.
Air Transport Association of America (ATA).
Aeronautical Radio, Inc. (ARINC).

Subsequently, by Order released February 24, 1971 (FCC 71M-302), no objections having been interposed, petitions by—

Communications Workers of America and Public Service Commission of West Virginia.

for leave to intervene were also granted. And by Order released March 1, 1971 (FCC 71M-331), similar petitions by American Tele-

phone Consumers' Council and Messrs. Ralph Nader and Reuben B. Robertson III, jointly, were granted. And, further, by Order released March 11, 1971 (FCC 71M–382), unopposed petitions for leave to intervene by the State of New Jersey, Grassroots Action, Inc., United Community Corporation, and Marshall S. Segal, Esq. (individually) were granted. Finally, over objections noted on the hearing record by the Bell System Respondents, the right to file an opposition pleading having been waived (T. 3287–89), a belated petition by the Commonwealth of Pennsylvania for leave to intervene was granted by Order released April 5, 1971 (FCC 71M–494).

11. The Commission's January 21, 1971 Order placed both the burden of proof and the burden of going forward with the evidence upon the Bell System Respondents. In order to meet its burden during Phase I of this proceeding AT&T introduced the testimony of some 12 witnesses, including that of its Vice Chairman of the Board (deButts), its Vice President and Treasurer (Scanlon), the Vice Chairman of the Board and Chief Economist of United States Trust Company of New York (O'Leary), and the Senior Vice President and Chairman of the Investment Committee of the Lincoln National Life Insurance Company (McDiarmid), and offered in evidence some 80 separately identified exhibits. The Trial Staff of FCC's Common Carrier Bureau, in its turn, presented in evidence the testimony of two experts in economics and corporation finance and utility rate regulation (Myers and Kosh) and offered some 61 exhibits. In addition, testimony in behalf of Microwave Communications, Inc. (MCI) (D. Edwin Winslow) and Telephone Users Association (Melvin J. Laney), intervenors, was exchanged and offered in evidence. The hearing in Phase I began with a prehearing conference on February 18, 1971 and the taking of testimony on March 8th. In all, some thirty-three (33) sessions (comprising over 5,000 pages and 33 volumes of transcript) were held between February 18 and April 30 and on May 5, 10, and 11, and in June, 1971. On June 3, 1971 the record on Phase I was duly closed.

12. In closing the Phase I hearing record, the Hearing Examiner, pursuant to Section 1,263(a) of the Commission's rules, *directed* all parties except the Commission's Common Carrier Bureau (*i.e.*, the Trial Staff) to file either proposed findings of fact and conclusions or briefs stating and analyzing their positions with respect to the issues in Phase I of this proceeding (T. 5140). This ruling was explicitly reaffirmed by formal Order released June 7, 1971 (issued June 4, FCC 71M–885). The following parties are considered to have complied at least minimally with the Examiner's directive: [2]

[2] By letter, Atlantic Richfield notified the Examiner and the parties that its interest was confined to Phase II of this proceeding. Other parties, *e.g.*, Data Transmission Company, indicated that their interests, to one degree or another, were generally confined to the cross-subsidization of interstate telephone services through the rate increases in MTS, which is being currently considered in other proceedings, or in other matters with which we are not directly concerned in Phase I of the instant proceeding. Although some of the parties, *e.g.*, American Telephone Consumers' Council, filed briefs or so-called 'proposed findings' which contain few or no citations at all to the record, or of precedents in the case law, and which do little more than to state flatly that AT&T deserves no consideration whatsoever, they have nonetheless undertaken to let the Examiner, and the Commission, know of their public spirited interest in the case. The parties who have defaulted have not displayed a modicum of interest, although the Commission might be warranted in suspecting that if publicity mileage, or similar self-aggrandizement, becomes apparently available to these defaulting parties during subsequent stages of the hearing process, these parties will spring to life—and action!

(1) Bell System Respondents.
(2) GT&E Service Corp. (for General Telephone & Electronics Corp.).
(3) Microwave Communications, Inc.
(4) The Telephone Users Association.
(5) The City of Chicago.
(6) The Secretary of Defense and the Executive Agencies of the United States Government.
(7) Data Transmission Company.
(8) United States Independent Telephone Association (USITA).
(9) Western Union Telegraph Co.
(10) The ABC, CBS, and NBC networks.
(11) Atlantic Richfield Co.
(12) Aeronautical Radio, Inc.
(13) Utility Users League.
(14) State of New Jersey.
(15) Grassroots Action, Inc.
(16) American Telephone Consumers' Council.
(17) Commonwealth of Pennsylvania.
(18) Air Transport Association.

13. The following parties have failed or omitted entirely to brief the Commission and the Hearing Examiner in accordance with the Presiding Officer's directive. They are clearly in default under Rule 1.263 (a) and, accordingly, the Commission may preclude them from authority to participate any further, at the least in Phase I of this proceeding: [3]

(1) United Utilities, Inc.
(2) National Telephone Cooperative Association (NTCA).
(3) National Retail Merchants Association, Inc. (NRMA).
(4) Public Service Commission of West Virginia.
(5) City of New York.
(6) Silver Beehive Telephone Company.
(7) Anthony R. Martin-Trigona.
(8) City of Los Angeles.
(9) United Community Corporation.
(10) Marshall S. Segal, Esq.
(11) Communications Workers of America.
(12) Messrs. Ralph Nader and Reuben B. Robertson III, jointly.[4]

14. In addition to the briefs, proposed findings, and/or statements filed by the other parties by the due date of July 12, the Trial Staff of the Commission's Common Carrier Bureau filed a compendium of 202

[3] Under para. (c) of Rule 1.263, "In the absence of a showing of good cause therefor, the failure to file proposed findings of fact, conclusions, briefs, or memoranda of law, when directed to do so [*i.e.*, by the presiding officer] may be deemed a waiver of the right to participate further in the proceeding."

[4] By a document entitled "Amendment to Proposed Findings and Conclusions," dated and filed July 19, 1971, Grassroots Action, Inc. sought, belatedly, to amend its previously filed proposed findings to include the names of Nader & Robertson as joint sponsors thereof with Grassroots. The justification for this—Robertson as Nader's counsel allegedly having been "detained out of town" when the Grassroots document was filed—appears to be a lame one. In any event, Robertson & Nader, as separate parties, are at least technically in default of the Examiner's directive and it is for the Commission to determine what the consequences thereof, if any, shall be.

numbered pages entitled "Proposed Findings of Fact and Conclusions of Law of the Trial Staff of the Common Carrier Bureau of the Federal Communications Commission." Reply briefs were filed by the Bell System and others by the deadline of August 2, 1971, by which date, for practical purposes the case first became ripe for Initial Decision. The Hearing Examiner has considered all filings, including the Trial Staff's, in the light of the 32-day hearing record and specifies the following as his findings and conclusions:

FINDINGS OF FACT

15. With minor editorial revisions paragraphs 10, 11 and 12 of the Bell System Respondents' proposed findings, deemed to be complete and accurate, are adopted as follows:

"10. In its actions initiating this proceeding, the Commission emphasized the applicability of the principles and standards established in its previous decision on rate of return in Docket No. 16258 [*In the Matter of American Telephone and Telegraph Company, et al.*, 9 F.C.C. 2d 30 (1967)] and expressed particular interest in the impact of changed economic circumstances since its previous formal proceeding. The Commission [declared] in the present proceeding that 'changes occuring in the capital structure and the costs thereof of AT&T subsequent to the 1967 decision, particularly the net increase in embedded cost of debt, were of particular importance' (27 F.C.C. 2d at 154). And it recognized that 'changes had taken place in the various elements which make up the cost of capital since the Commission's 1967 decision in Docket No. 16258' (27 F.C.C. 2d at 155)."

"11. The Commission's 1967 decision that the fair rate of return for the Bell System's interstate services was in the range of 7.0 to 7.5 percent was based on an evidentiary record reflecting the economic conditions of the 'test period' 1966 (9 F.C.C. 2d at 114). The Commission stressed that the appropriate return for a regulated utility varies with changes in circumstances.

In its initial opinion, the Commission held (9 F.C.C. 2d at 116):

'Although we regard this range of return as appropriate on the basis of this record, we recognize that the facts and circumstances upon which our determination rests may change with time. . . . As, and when, the going level of respondents' interstate earnings approaches either the upper or lower limits of this range, we will promptly consider what further action may be required in light of the then current conditions.'

The Commission in its opinion on reconsideration made clear that the 7½ percent return figure, based on test period results, was not an arbitrary ceiling and would not be binding for different conditions. It states (9 F.C.C. 2d at 964):

'In discharging our regulatory function, after implementation of our decision herein, we will have the benefit of the principles formulated in this proceeding and shall apply them in the light of future conditions. . . . In view of the foregoing, it should be clear that the 7–7½ percent range is applicable only so long as the conditions obtaining during the test period continue and that these figures do not represent either an absolute floor or ceiling, but are subject to revision as circumstances change.'

"12. In its decision in Docket No. 16258, the Commission contemplated that its review of the effect of changed economic circumstances for rate of return might be made within the framework of its practice of continuing surveillance (9 F.C.C. 2d at 963–64, 971. [And] in its 1969 continuing surveillance review of Bell System interstate earnings, the Commission confirmed that there had been 'substantial changes from the conditions which prevailed at the time of the 1967 decisions' which justified a higher rate of return for the Bell System's interstate services (Bell Ex. 7). In its Public Notice (21 F.C.C. 2d 654), adopted by the Commission on November 5, 1969, following its continuing surveillance review,

the Commission pointed out that the examination of the Bell System's interstate earning was made 'within the framework of the principles and standards it formulated in its decisions' in Docket Nos. 16258. The Commission found that, in light of the then existing economic conditions, the Bell System's interstate earnings level which exceeded the upper limit of the 1967 range was not unreasonable. It stated (Bell Ex. 7) :

'The Commission based this view on the changes which have taken place since 1967 in the economic, financial, and other conditions that affect AT&T's revenue requirements and its ability to attract new capital. The Commission noted particularly the sharp increase in the interest rates on borrowed capital, the resulting increase in the Company's cost of embedded debt, the much higher rate of inflation today, and the need to raise substantial amounts of new capital under current market conditions. These factors constitute substantial changes from the conditions which prevailed at the time of the 1967 decisions and must be reflected in a current assessment of the Company's cost of capital and revenue requirements.' "

Economic Trends and Changes (Dr. O'Leary's Testimony)

16. In order to demonstrate, among other economic matters, that major changes in economic conditions and the financial climate have indeed occurred subsequent to the Commission's rate of return determination in the Docket No. 16258 proceeding, the respondents presented the testimony and opinions of Dr. James J. O'Leary, Vice Chairman of the Board and Chief Economist of United States Trust Company of New York. In addition to Dr. O'Leary's impeccable credentials as the holder of an economics doctorate from Duke University; as a teacher and professor of economics in two universities (Wesleyan and Duke) ; as an economic consultant to Connecticut General Life Insurance Company; as, for 20 years, the Director of Investment Research and Vice President and Economist of the Life Insurance Association of America whose principal function it had been to conduct research on Life insurance companies within the money and capital markets of the country as a whole; and for 2 years as Chairman of the Board and Chief Economist of Lionel D. Edie & Co. (a firm specializing in economic consulting and investment counseling) ; and whose entire career, virtually, has been devoted to research and analysis of developments in the United States economy in our money and capital markets; Dr. O'Leary submitted an impressive array of economic data and unimpeachable information to support most of his economic viewpoints. While the evidence of record herein does show that Dr. O'Leary and the trust company of which he is Vice Chairman of the Board do have an economic interest in supporting the position of the Bell System Respondents in this proceeding,[5] the economic data submitted by him and the Bell System Respondents herein support his judgment of the condition of the economy. Dr. O'Leary's testimony, on balance, was therefore considered to be persuasive by the Hearing Examiner.

17. Dr. O'Leary's testimony, together with other record data, showed convincingly that there have been significant (indeed, monumental) economic and financial changes since 1965, that have had severe impact

[5] United States Trust Co. is a trustee under an AT&T 2.75% debenture due October 1, 1976 and has been debenture Registrar and Paying Agent for a number of Bell System subsidiaries; has provided a line of credit to New York Telephone Co.; and holds as trustee, as of March 9, 1971, a total of 2,485,565 shares of AT&T stock for its customers (T. 966–969).

on capital costs, both debt and equity. Consequently, the Examiner perceives no reason why he ought not to adopt, virtually *verbatim*, the following findings on the state of the U.S. economy proposed by AT&T, as a clear and objective exposition of what the record shows:

"14. Significant changes in economic conditions and the financial climate have taken place since the mid-1960's, and they have had a significant impact on the cost of capital, both debt and equity. The years immediately prior to the Commission's decision in Docket No. 16258 were characterized by unusual economic stability, while the period thereafter was characterized by a sudden acceleration of the rate of inflation and a marked rise in capital costs. In the 'Inflation Alert' prepared by the President's Council of Economic Advisers, August 7, 1970, . . . the inflationary process since 1960 was described as follows: There was the 'period of stability' from 1960 to 1965, during which the rate of inflation was exceptionally steady; the Gross National Product (GNP) deflator rose at an annual rate of 1.4 percent, and the Consumer Price Index (CPI) had an average annual increase of 1.3 percent over that five-year period. . . . An 'initial upsurge' in the rate of inflation took place in early 1966. . . . Then, the 'inflationary movement subsided temporarily from the spring of 1966 to the summer of 1967'; during this period the indicators showed an arrest in the slight inflationary trend. . . . This period of price stability ended, however, in the fall of 1967, and from [that] period on there has been a period of rapid inflation. . . . The CPI increased 4.2 percent during 1968, 5.4 percent during 1969, and 6.1 percent during 1970. . . . Thus, the 'temporary lull' in the rate of inflation coincided with the time of the Commission's decision in Docket No. 16258, and the recent inflationary boom commenced almost immediately thereafter in late 1967. . . .

"15. The inflationary surge and the contemporaneous changes in investor return requirements [naturally] have had a profound impact on the cost of capital. The dramatic effect on debt costs is evidenced by the sharp increases registered in the last several years, as shown by the following average yields on new issues of Moody's Aaa public utility bonds (Bell Ex. 34A, Att.B):

	Percent
1960	4.77
1961	4.51
1962	4.36
1963	4.31
1964	4.46
1965	4.57
1966	5.44
1967	5.85
1968	6.57
1969	7.75
1970	8.59

During the latter part of 1970 and early 1971, interest rates dipped to about 7 percent, but [they] since have climbed [once more]. . . . As of the close of the record, the yields on new bond issues were in the range of 8 percent . . . Although somewhat below the peak in interest rates reached in mid-1970, bond yields are about three percentage points higher than in the 1965–66 period.

"16. Dr. O'Leary testified that there have been three main forces accounting for the rising trend of interest rates: (1) during the expansion of the economy, as capital requirements have risen, the aggregate demand for capital funds has tended to outrun the available supply; (2) monetary policy (Federal Reserve and Treasury debt management) has often been forced to be restrictive as a means of combating inflation; and (3) inflation and the expectations of continuing inflation have greatly increased the aggregate dollar demand for capital funds, and at the same time reduced the willingness of savers to place their funds in fixed-income obligations unless the interest rate is high enough to offset the deteriorating effect which inflation is expected to have on the value of the dollar. These inflationary considerations [do indeed] place a 'premium' on the level of the return the investor requires. . . ."

"17. Although governmental policy has been designed to moderate the rate of inflation, the expectation of a continuing high level of inflation is widespread. Dr. O'Leary testified that the Government's economic policy for 1971–1972, indicating an expansionary policy and an objective of a 'full employment budget', has tended to rekindle the fear of inflation during the next few years. . . . Indeed, various indicators show a continuation of price increases in 1971; the wholesale price index for industrial commodities increased at an annual rate of 4.8 percent in April 1971, and the GNP implicit price deflator increased at an annual rate of 5.6 percent in the first quarter of 1971. . . . The pattern of wage settlements recently has also contributed to an expectation of further inflation. . . .[6] Dr. O'Leary expect[ed] a gradual rise in the level of interest rates in the second half of 1971, . . . because of: expected further increases in the total demand for long-term funds by corporations and the Government to record levels; the expected increases in the amount of Treasury borrowing in the latter part of the year; the continuing powerful expectation of a high rate of price level increases; the enormous backlog of demand for long-term financing by state and local government units; and the expected sharp rise in demand for home mortgage credit. . . . In his view, economic conditions in 1972 are apt to produce a sharper increase in interest rates. . . . This is based on an expectation of an inflation rate of about 4 percent in the next year, which, when coupled with a general improvement in the economy, would produce increased demands for credit. . . ."

18. Dr. O'Leary's credentials as a prophet have been enhanced, moreover, by economic events that have occurred since March of this year when he testified. Thus, as this is written the year of 1971 is already half over and the gradual upward trend in long and intermediate term interest rates during June and July has been clearly discernible to all who care to see. Without attempting at the present juncture to quantify the effects, the evidence unquestionably supports the proposition advanced by the Respondents that there has been a "sharp" rise in the cost of debt capital, and an associated increase in equity costs since 1966. It is indeed elementary that, generally speaking, equity costs exceed debt costs because the equity holder "bears most of the risk of the business enterprise" and therefore requires a higher return than bondholders whose interest is a senior claim on both assets and income.

The Positions of the Parties

19. Having considered generally the economic and financial changes that have occurred since the Commission's 1967 AT&T rate investigation, it would perhaps be useful to digress for the moment in order to try to encapsulate the more significant of the arguments of some of the parties.

20. As summarized by the Trial Staff (Trial Staff's proposed findings, para. 10), the Bell System Respondents are saying, in essentials, they require more than $7 billions annually to fund their construction

[6] On July 19, 1971, announcement was made of a "tentative" strike settlement by the Communications Workers with the Bell System which called for an approximate increase of 33.5% in wages and fringe benefits over the course of the new contract (*i.e.*, the next 3 years). The same announcement indicated that the total cost to AT&T will approximate $1 billion. Wage settlements recently negotiated in other industries, *e.g.*, container industry (American Can) and Copper, and the as yet unsettled demands of labor elsewhere, clearly indicate a pattern that supports Dr. O'Leary's diagnosis. Indeed, recognition of the still unleashed engine of inflation by the investment community is evinced by the loss of about 100 points in the Dow Jones Average during July and the first few days of August; and the international banking community has similarly reacted by showing its concern for the U.S. dollar, while the domestic banks have reacted by raising the prime rate back to 6%.

109-045—73——2

program; that the bulk of the required construction money, in excess of $4 billions, must come from external financing; that the rapid inflationary spiral since the 1966–67 period has raised AT&T's average embedded debt cost for the year 1971 to approximately 6% from 4½% in 1966 and that the cost of equity capital today ranges between 11 and 13% for Bell System; that the market price of AT&T common stock, which has hovered lately around book value, is too low to enable the company to float new equity without unfairly penalizing existing shareholders by dilution of their equities; and that further additions to Bell System debt is inadvisable because the debt ratio, which approximates 46%, is now as high as it ought to be. Also, it appears that the Respondents not only advance their capital requirements as a basis for seeking a higher rate of return; they likewise make the point that their existing shareowners are entitled, under current economic conditions, to the equity returns they are seeking herein. In short, they ask an increase in their allowed rate of return, established by the Commission in the proceeding in Docket No. 16258, in a range from 7.0 to 7.5%, to 9.5%, which they maintain would provide a fair return to present shareowners and, in addition, would result in sufficient elevation of the market price of AT&T common shares so as to permit the successful sale of the new equity needed to finance the construction of facilities that must be provided in order to maintain a high grade of common carrier message toll telephone service to the general public.

21. As explained in its proposed findings (para. 11), the Trial Staff's position is that the Respondents have failed to demonstrate that their heavy construction program expenditures of the recent past have been made prudently and economically, that 45% is the maximum amount of debt they can safely and prudently carry, and that the cost to them of equity capital today is between 11 and 13%. The Trial Staff maintains, indeed, that it would be both prudent and economical now for the Bell System to adopt a 50% debt ratio for their capital structure, and that AT&T's "unduly conservative past and present financial policies have unreasonably increased the present capital cost burden". The Trial Staff opines that the record supports a finding that the current cost of equity capital to AT&T is in the range of 9.75% to 10.25%. Grudgingly, the Trial Staff agrees that economic conditions, "particularly the cost of long term debt", have changed since the decision in Docket No. 16258, and that the 7.0 to 7.5% overall rate of return range established therein is now outmoded "and not applicable to current conditions". Consequently, as an ultimate conclusion, the Trial Staff recommends that the Respondents, as an entity, be permitted to earn overall in the range of 7.75% to 8.25% and that the rates for their interstate services be adjusted to permit them to earn at the midpoint thereof (presumably 8.0%).

22. The Trial Staff argues still further that while, "in ordinary circumstances", the Respondents ought to be directed to set rates so as to realize initially a return at "the lower end of the reasonable range", because of "the various costly mistakes" AT&T's management is claimed to have made with the Bell System's financing and construction program, as a spur or incentive to improved future performance, nonetheless it is willing to take account of current uncertainties in the

economic picture (having to do with the failure of the government to satisfactorily control the rate of inflation and the apparent continued instability of interest rates) in order to moderate its position so as to recommend the midpoint of the 7.75% to 8.25% rate of return range, *supra*. The Trial Staff also asserts that, in fixing the rate schedules in Phase I of this proceeding, AT&T had agreed that due account would be taken of its earnings on its investment in Western Electric, which, after taking such earnings (which exceed the earnings from communication services) into account, would enable the Respondents a rate of return of about 7.8% on interstate services "as a mathematical calculation", in order to actually realize an overall 8% rate of return on the Respondents' interstate operations.

23. With respect to the positions of the several intervenors who have undertaken, in accordance with directive, to brief the Presiding Officer and the Commission as to their positions, it is noteworthy, the Examiner believes, that the City of Chicago has recommended an overall rate of return of 8.2% as a fair rate of return for AT&T, predicated on that City's adoption of the Trial Staff's "methodology"; that the State of New Jersey, which expressed concern lest AT&T's rate of return "be placed too high" so that its subsidiaries would seek a corresponding high rate of return on *intrastate* revenues, "pointing to the interstate rate of return as a guidepost", and let it be "set too low", thereby increasing the *intrastate* burdens, recommended "that the rate of return of the AT&T Company be allowable in the range of 8.0% to 8.5%", predicated on the assumption of a 9.75% to 10.5% return on equity and an embedded debt cost of 6.0%; that several of the other intervenors, including Grassroots Action, Inc. and the Department of Defense and the Federal Executive Agencies, recommended that no change *whatever* be made in AT&T's authorized overall rate of return; and that USITA supported an overall rate of return in the 9.3% to 9.6% range. It thus appears at the threshold that there is a wide divergence of judgment and opinion upon the subject matter in issue herein and that, while reasonable men may differ widely as to a proper outcome, it is for the Hearing Examiner and later the Commission, after carefully weighing the pertinent data of record, the probative evidence, and the opinions of the experts, to arrive independently at a definitive conclusion on what is a fair and proper rate of return for the Bell System Respondents in the year 1971. The record details will now be analyzed.

Rate of Return on Equity

24. Apart from the management judgments that the Trial Staff faults, which will be considered later, perhaps the most difficult task confronting the Hearing Examiner is that which involves the necessity of determining an appropriate percentage return on equity for the Bell System under prevailing conditions, for this is the point on which there happens to be the greatest divergence of opinion in the record. (It is to be noted preliminarily that there appears to be general agreement that 6.0% is a reasonable estimate of the embedded debt cost to Bell System for 1971.) The Examiner, in this connection, has carefully examined the Respondents' evidence in support of

their view that AT&T should earn in the neighborhood of 12.5% on book equity. He does not consider such evidence to be sufficiently definitive and persuasive, on balance, to justify the requested finding.

25. First there was the recommendation of Mr. McDiarmid, now retired but formerly (for many years) a supervisor of the securities investment program of the Lincoln National Life Insurance Company, that Bell System requires a return of between 12.5% and 13% on book equity (Bell System Proposed Findings, para. 65). This conclusion, however, was predicated on Mr. McDiarmid's virtually unsupported opinions and assumptions regarding the current spread between the cost of debt and of equity capital, the return earned today by electric utilities, and the relationship between equity returns and market value of AT&T stock. As the Trial Staff observed (Trial Staff's Proposed Findings, para. 87), he seems to have relied heavily on the long-term interest rates that prevailed prior to November 20, 1970, which have since retreated substantially; on 10 to 10.5% yields that Lincoln National appears to have averaged on straight debt type securities; on an assumed debt ratio of 44% for Bell System; and on an unsupportable conclusion that AT&T, with over 3 million shareowners, the largest corporation in the world, is just another stock on the exchange that enjoys no special investor favor and lags behind the parade in the competition for the investor's dollar.

26. While Mr. McDiarmid spoke of "enormous" pressures on the money market resulting in a supply-demand imbalance, it appeared that the availability of capital had improved significantly between November of 1970, when his direct testimony had been prepared, and March of 1971 when he was cross-examined. Interest rates, of course, had also declined substantially during the same period. Although McDiarmid was aware that the trend in Disposable Personal Income was up, he had not the slightest notion what the figures were; nor could he provide data as to the cash inflow to financial institutions during 1970. Data submitted in evidence independently (by the Trial Staff), on the other hand, indicated that Disposable Personal Income (DPI), in current prices, had increased more than 8% in 1970 compared with 1969 and net cash inflows were more than 10 times higher in 1970 than the year before. On the whole, the record makes it abundantly clear that Mr. McDiarmid relied more on visceral reaction and intuition than upon solid data, particularly in regard to the alleged supply-demand imbalance in the money markets. Indeed, contrary to his rather dire views, the evidence does indicate that for the near-term future, with which we are here primarily concerned, the supply of lendable funds is, and will continue to be, adequate. Perhaps the best evidence of this is the current (July 1971) behavior of the money market, paying particular heed to the actual movement of interest rates which seem to be trending upward but very sluggishly. Another Bell System witness put his finger on the apparent truth when he conceded that "thus far this year we are in the range of 7.50[%] or a little higher", which he characterized as a moderation of the 1970 level of interest rates, and that 7.8% would be a reasonable estimate of the average for 1971 (T. 4934, 35). The record, on the other hand, is barren of probative evidence or solid economic data, that the trier of the facts would

be entitled to depend upon, showing that the money markets cannot absorb heavy new bond issues successfully, on a reasonable cost basis considerably below the 9% for high quality debentures relied upon by Mr. McDiarmid.

27. The Hearing Examiner agrees generally with the analysis by the Trial Staff, paragraphs 92–104 of their proposed findings, of Mr. McDiarmid's testimony. There is no need to encumber this Initial Decision further, so these paragraphs are adopted and incorporated herein by reference. Particularly, the Examiner concurs with the Trial Staff (para. 102 of their proposed findings) that we are left with having to evaluate McDiarmid's 12.5 to 13% recommendation in the light solely of his professional experience generally and his contact primarily with institutional type investors who hold only slightly more than 20% of AT&T's stock; and that his conclusion that AT&T is just another stock with no particular investor appeal conflicts with the weight of the evidence, which shows the exact opposite to be the truth.

28. The Respondents also submitted the testimony of Mr. Robert H. B. Baldwin, a general partner in the investment banking firm of Morgan Stanley & Co., in support of their alleged need to maintain the top "AAA" rating by Moody's and Standard & Poors on their bonded indebtedness and to substantiate their claim of a cost of equity in the neighborhood of 12.5%. As the Trial Staff indicated, Mr. Baldwin, like Mr. McDiarmid, was not exactly an "independent or objective judge of the Bell System's required rate of return" (Trial Staff's proposed findings, para 106). For the evidence discloses that both he personally and his firm have collaborated with Bell System management for years and that Morgan Stanley is indeed dependent on a still continuing commercial relationship with AT&T for the floating of the latter's capital bond issues. During 1970, it appears, approximately 18% of the $7 billion in debt issues underwritten by the Morgan Stanley firm was for AT&T.

29. According to Mr. Baldwin, a top credit standing is vitally important to the Bell System because it leads to lower interest rates, a broader market for the company's equity, and a cushion for debt financing during times of difficulty. Elaborating, he argued that during times of high interest rates, individuals flock to quality debt and, consequently, if Bell System bonds are downrated, their sale would be both more expensive and more difficult; that debt ratio and interest coverage are important factors in rating bonds; that new AT&T equity ought not to be sold below book value because that would lead to a downward cycle for earnings per share and market price; and that today's informed investor seeks a market return of 11% to 13% on common stock investments, which is modest compared with the 8.5% to 9% which is "readily available today" on Bell System bonds.[7] To him the 11% to 13% is apparently the overall market return which the proverbial "average investor" is presumably looking for in the stock market over a period of years; AT&T ought to provide this self-same return without regard to risk factors, merely because it competes gen-

[7] As of July 1971, yields on Bell System bonds or debentures were approximately 8%. But on August 3, 1971 (paragraph 79 and footnote 11, *infra*), $100 million Indiana Bell debentures were sold to yield 8.20%.

erally in the market place for equity capital; and GM, G.E., duPont, IBM, Avon, Johnson and Johnson, among others, are to be considered as indicative of investments comparable to AT&T.

30. The evidence, however, includes solid data that impeach Mr. Baldwin's approach. Corporate profits, for instance, were off some $10 billion in 1970 from a 1969 total of approximately $91.6 billion, while AT&T's profits for the year ending in February of 1971 were only a penny less per share than in the preceding year. There is indeed no question that telephone company stock has a "low volatility index" (Trial Staff, Proposed Findings, para. 107a); and there is persuasive record support for the proposition that both AT&T's earnings and the market prices for its stock are more "stable" than the corporate economy or stock market as a whole. For example, between 1969 and 1970, AT&T's stock seems to have declined only 13.7% while Moody's 24 Utilities declined 22.2% and Moody's 125 Industrials declined 24.4%. And these statistics are confirmed by AT&T's Vice Chairman, Mr. deButts, who agreed in effect that AT&T's stock was more resistant on the downside than others whose equity earnings were higher and that institutional investors had recently found AT&T to be increasingly attractive, notwithstanding the pendency of this proceeding. In addition, Bell System's own evidence (Bell Ex. 72) discloses that AT&T's stock experienced substantially greater price stability than the Dow Jones Industrial Average between May 1970 and May 1971. Moreover, in comparing AT&T's earnings performance in 1969 with the performance in 1970, a reduction of one cent or from $4 a share to $3.99 a share, it appears that 4 cents of the 1969 earnings are attributable to the non-recurrent sale of a Bell company (Carolina Telephone), so that there was actually a 3-cent earnings *increase* in 1970 over 1969. Finally there is unassailed testimony by one of the Trial Staff witnesses, Dr. Myers, that in general AT&T's stock is only 70% as risky as the average common stock (Trial Staff proposed findings, para. 108). Considering the problem in proper perspective, therefore, no warrant appears in the probative evidence for the failure of Messrs. McDiarmid and Baldwin to evaluate AT&T stock in the light of the risks. It may be officially noticed that different investors have different investment objectives and the evidence supports a view that, for those who desire maximum downside protection, along with steady income and yet a chance for long-term capital gains, AT&T stock still appears to be especially appealing.

31. Mr. Baldwin maintained that if interest rates were in the 8.5% to 9.0% range, 11% to 13.0% equity returns would be modest, while if they were at 7.25%, 11% would suffice. It would seem, moreover, that Baldwin regards up to 4 percentage points above the interest rate on long-term debt as a reasonable equity premium, notwithstanding his concession that he saw no precise relationship between the two return levels (T. 1991). Yet there is no data support for such a spread other than Mr. Baldwin's undocumented experience.

32. It is also noteworthy that Mr. Baldwin's opinion that $2.5 billion of long-term straight debt is the maximum Bell System could float annually on reasonable terms was uncorroborated by any data other than by his general professional experience as an investment banker.

Similarly, with regard to his opinion that Bell System's capital structure ought not to exceed a debt ratio of 45%. Overall, the Examiner is unimpressed (and unpersuaded) by Mr. Baldwin's recommendation as to equity returns, *primarily* because of the dearth of objective evidentiary data adduced to support it against which such views could be tested by disinterested analysis. It will not suffice in a proceeding of such magnitude as this for the carrier to limit itself to the proffer of testimonial opinions, predicated solely on generalized experience and investment predilections and intuitions, by so-called "interested" witnesses, however expert these may be. If such opinions are to be considered persuasive they ought to be supported convincingly by factual underpinnings.

33. The Bell System Respondents, largely through the testimony of Mr. Baldwin, urge that continuing the "AAA" bond ratings for Bell by Moody's Investor Service, one of the prinicipal bond rating agencies, is crucial to them, because a downrating would narrow the market for Bell System debt, result in higher interest charges, and make it more difficult to market debt during periods of tight money when investors who prefer high quality bonds enter the market. There is no question that Moody's (and Standard & Poor's) bond ratings are intended to provide the investor with one (of several) means of evaluating the investment quality of debt issues and that, to the rating services, the quality of bonds depends essentially on how well interest payments and principal are protected. To acknowledge this, however, is in no way to credit the Bell System Respondents' trepidations concerning the evil impact on them of downratings or the imminence thereof. Indeed, their proof in these regards, in the Examiner's judgment, was singularly unconvincing as a demonstration that Bell System debt securities, now rated "AAA", are in any kind of serious or imminent peril of being downrated by Moody's, and certainly, in any event, that a downrating to "AA", even if imminent, would involve any significant increase in revenue requirements for Bell System.

34. It is a shaky assumption to begin with that the ratings given to AT&T by the ratings services are in the same category as the ratings given by these services to lesser known companies and that, somehow, these ratings necessarily loom larger in the investment community's mind than Bell System's reputation over the years. Indeed, it cannot be lost on the mind of the careful investor, no matter what the rating agencies may say, that AT&T has not reduced or missed a dividend payment in 50 years and that it has met all interest payments on its indebtedness with characteristic promptness. In any event, Mr. Robert W. Burke, Moody's Vice President who is specifically in charge of public utility bonds at Moody's, pointed out that the rating process is far from mechanical; and that, in addition to pre-tax interest coverage and debt ratios, the following elements are considered; diversification through size; derivation of revenues and the nature of service areas; types of earnings; regulatory climate and rate of return; management's financial policies; public ownership threats; and political trends. Mr. Burke also testified that Moody's regarded AT&T's management "as very high grade" (T. 2919); that public ownership was irrelevent as far as AT&T is concerned; that it is "very difficult" to specify what is

the "political trend" for AT&T; that if the "political trend" in a big state like New York was considered by Moody's to be adverse to AT&T, this would affect his judgment only insofar as New York Telephone Company bonds are concerned, and that Moody's still rates these bonds "AAA" (T. 2919–21). He indicated, moreover, that Moody's saw no signs of trouble with Bell System's ratings and that the service was primarily concerned at present about certain "AAA" rated electric utility companies. If AT&T continued to add debt to its corporate structure with no equity, it *may* become of concern "somewhere down the road". Finally, it appears from Mr. Burke's testimony—Mr. Burke being in a better position to know than either Mr. McDiarmid or Mr. Baldwin, or any other witness—that Moody's changes ratings only to reflect *basic* changes in a company's investment position that may prevail for some time and that a poor financial showing of from 3 to 5 years duration may be necessary to warrant downrating a company's bonds.

35. The evidence does disclose that Bell System's pre-tax interest coverage has slipped considerably, at least since 1965 when it was 10.5. At year-end 1970 it stood at 4.93. While it does appear that Moody's is "concerned" about the level of interest coverage on debt, its primary worry appears to be the downward trend. It estimates AT&T's consolidated pre-tax interest coverage at approximately 4.0, perhaps a shade more, by year-end 1971, on the assumption of a 6% increase in pre-tax earnings and $2.5 billion debt financing. The company itself calculated a pre-tax coverage of 3.82 by year-end 1971, on the assumption of all-debt financing and a 7.62% rate of return. While these data seem to suggest to the Respondents that Bell System debt might be headed for a downrating, any such conclusion, the Examiner is persuaded, is simply unwarranted by objective facts, such as evidence (Staff Ex. 19) indicating that each of the seven electric utility concerns that had been downrated from "AAA" to "AA" by the rating services up to December 1970 had debt ratios exceeding 50% prior to downrating, while Bell System's debt ratio at the close of 1971, with all-debt financing until then, would be only 48%. There is also the factor, mentioned by the Trial Staff in paragraph 118 of their proposed findings, that, unlike the example of the downrated electrics, the consolidated AT&T system-wide interest coverage figures have the effect of substantially understating the actual coverage of the individual operating units of the Bell System. The rating services look at the indebtedness of the individual operating companies separately, and downrating of one such company would not necessarily mean that all would be downrated. The evidence discloses, furthermore, that at year-end 1970 only two Bell System subsidiaries had interest coverage below 4.0, while several (*e.g.*, C&P of West Virginia: 7.1; New Jersey Bell: 6.5; South Central Bell: 6.5; Southwestern Bell: 6.6) were substantially above 4.0 coverage.

36. Mr. Baldwin maintained, without persuasive supporting data, that a downrating of Bell System debt from "AAA" only to "AA" (there was nothing but unsupportable conjecture that downrating to "AA" would ultimately be followed by an "A" rating) would narrow the market for the sale of Bell System debt. Nor had he the slightest

notion what the extent of the narrowing, predicated on alleged investor reluctance to purchase "AA" rated bonds, would be, and he admitted that very few investors (if any) would be legally barred from investing in "AA" rated bonds. Indeed, the record indicates plainly that both "AAA" and "AA" bonds are regarded as being of the highest quality; the difference in quality between these two ratings being minimal.

37. Insofar as the effect of a bond rating of "AAA" (as distinguished from "AA") upon individual (as distinguished from institutional) investors is concerned, the evidence on the subject was highly conjectural in character. There is at least an indication, nonetheless, that individual investors may have cared less, at least during 1970, about bond ratings than they have about the general reputation of well-known corporations. Thus, evidence was adduced which showed a higher percentage of individual investor participation in "AA" rated utility bonds issued during 1970 (Detroit Edison) than in a "AAA" rated oil company (Shell Oil). See Trial Staff's proposed findings, para. 121; T. 1776–79.

38. There was also evidence indicating that during the year 1970, of corporate bonds rated by Moody's that were sold then, 31.2% were "AAA"; 23.9% were "AA"; 37.9% were "A"; and 7.0% were "BAA"; and, further, that of 147 separate bond issues aggregating $5.75 billion of privately-owned public utilities, less than 20% were "AAA", while 46.95% were "AA", and 33.6% were rated "A" or lower. It therefore appears, if this data can be relied upon, that in a year (1970) when money was notoriously "tight" and when, at least according to Mr. Baldwin, investors were looking for "quality", electric utilities rated by Moody's as "AA" or lower were successful in borrowing about as much capital as Bell System raised in that year. It is also obvious that the investment community at large, whether individual or institutional, bought proportionately more debt rated below "AAA" than debt rated "AAA" that year, and so it is quite difficult to be other than extremely skeptical about the claimed importance of the "AAA" bond rating to the Bell System, and certainly about the suggestion that a downrating to "AA" would seriously impair its ability to sell debt on reasonable terms.

39. On the assumption that there are two Bell System associated companies that are candidates for possible downrating, the Trial Staff tried to calculate the additional cost of debt to those companies if downrating had occurred in 1970, pointing out, however, that in "normal" periods the cost spread between "AAA" and "AA" rated debt had been minimal, while in 1970, which admittedly was an uncertain period the spread for the year as a whole amounted only to 21 basis points. The two "most vulnerable" companies selected by the Staff were New York Telephone and Pacific Telephone which together issued bonds aggregating $675 million during 1970. According to the calculation, if these companies were downrated to "AA" during 1970, a "rough" estimate of their additional debt cost on a full annual basis that year can be obtained simply by multiplying the $675 million they raised by the 21 basis points (.21%), which results in a figure of $1,417,500.00. If the latter sum were added to Bell System's total

interest and amortization of $992,193,000.00 for 1970, the effect would be to increase AT&T's embedded debt from 5.78% to 5.79867% (Trial Staff's proposed findings, para. 124).

40. On balance, the Examiner finds the Trial Staff's rationale concerning the so-called downrating problem to be quite convincing. Indeed, he agrees that the evidence is persuasive that any peril of downrating to the entire Bell System must be discounted as the remotest of possibilities; but that, even if this were to come to pass, the result would scarcely be dire, on the basis of the present record at least, insofar as Bell System's ability to meet its capital needs is concerned. In the latter connection, the fact that in 1970 the privately owned electrics rated by Moody's raised a total of $5.75 billions through a total of 147 bond issues, more than 80% of which was rated "AA" or below; and the fact that more than two-thirds of all corporate bonds sold during 1970 had ratings of "AA" or below; compel the conclusion last stated.

41. Although he was not the first to testify on behalf of the Respondents, Mr. John J. Scanlon, AT&T's Vice President and Treasurer, was obviously the Bell System's principal witness on rate of return, capital structure and financing of the construction program. His testimony is recounted in substantially accurate detail in the Trial Staff's Proposed Findings, beginning at paragraph 156. It would prolong this Initial Decision for it to reiterate the Staff's summaries. However, the highlights of the data presented through Mr. Scanlon in paragraphs 156–190, inclusive, must at least be touched upon herein and, to the extent that pertinent factual information is contained in his testimony, this must be set forth in some detail at least.

42. As the company's principal witness on policy matters, Mr. Scanlon was insistent that AT&T's debt ratio ought to be maintained at between 40 and 45%, on the basis of which something in the order of $1.5 to $2.0 billions of new equity capital out of total annual capital requirements of between $4.0 and $4.5 billions would have to be raised merely in order to hold the ratio at the 45% level. The validity of this policy assumption is at the heart of the Respondents' theory of their case, for it is a matter of simple arithmetic, as was persuasively demonstrated by the record, that equity capital, generally speaking, is substantially more expensive to a corporation (and to the rate-paying public, one may add) then is debt capital. The desirability of letting AT&T's debt ratio slip below 45% versus the contrary advice that it be encouraged to rise at least to the 50% mark, naturally generated the most heated controversy. The data that bears on this question and the relationship thereof to the return on equity matter requires careful analysis.

43. The evidence shows clearly, to begin with, that during the period 1960–64, which admittedly was a period of economic stability, utility bonds and debentures carried interest coupons at an approximate 4½% rate, whereas these rates on such securities had gone to the 9.0% level, and even higher, during 1970, representing a rise of about four percentage points, overall. Since then, however, such rates declined rapidly to the 7.0% range early in 1971 and have risen to approximately 8.0% by July of this year, or still some 3.0 to 3.5 percentage points

above the 1960–64 period. As has been indicated, *supra*, the evidence discloses a likelihood that there will be no significant decline in these expensive rates of interest for the foreseeable future and that, moreover, the tendency of interest rates for the second half of 1971 is likely to be sluggishly upward. On balance, indeed, it is reasonable to predict, in conformity with the testimony of one of Bell System's witnesses on cross-examination, that the cost of new long-term indebtedness to Bell System during the entire year 1971 will average 7.8%. It is also reasonable, almost as a corollary, that the cost of new equity during the current period is certain to be considerably higher than it was estimated to be in the Docket No. 16258 proceeding.

44. According to undisputed testimony of Mr. Scanlon, if all 1971 external financing were to be accomplished through the sale of debt securities, the capital structure of Bell System would reflect a 48% debt ratio by year-end. However, by the issuance of $1,375 million of 8% convertible preferred stock during the month of June, 1971, it now appears that Bell System's debt ratio will approximate 45% by year-end 1971. The evidence indicates that the climb in AT&T's debt ratio from the 33% level in the year 1966 to the current level of about 45% was a consequence of heavy capital demands and financing by debt exclusively, as well as of the sharp rise in interest rate levels. The heavy increments of debt coupled with the steep rise in debt costs caused the "embedded" cost of debt to rise from about 4% in 1966 to about 5.8%. Indeed, it is a reasonable estimate that the "embedded" cost will exceed 6.0% somewhat by the end of 1971. At the same time, interest coverage, or the number of times revenue exceeds the interest requirements, has been on the decline. The evidence does show that during the early 1960's Bell System's interest coverage was substantially greater than that of the "AAA" rated electric utilities, and that since then the coverage of both have declined but that the decline of Bell System's has been more precipitate. This circumstance, in conjunction with the fact that some of the electric companies have been downrated, was undoubtedly a motivating factor behind Bell System's decision to reduce its debt ratio to a range between 40% and 45%.

45. The historical development of AT&T's capital structure and the comparisons that may be made in regard to risk with the electric utility companies merit attention, certainly to the extent that such analysis tends to shed light upon the prudence of the debt ratio policies of AT&T's management. In the early 1920's the Respondents' policy was to maintain a capital structure for the consolidated Bell System of 30 to 40% debt and 60 to 70% equity. By 1929 the Bell System's debt ratio was about 34% and during the deep depression years of the 1930's it ranged between 26 and 30%. The funds required to provide for the initial expansion of the Bell System in order to meet the pent-up demand for telephone service after World War II came principally from the issuance of debt securities. At that stage in the history debt money had been plentiful and interest rates were low. The debt ratio of Bell System was allowed to rise from 31% in 1945 to a peak of 51% in 1948. The policy of management, however, was to keep the debt ratio over the long pull in the 30% to 40% range, and so by 1954 the debt ratio declined to 35%, principally as the consequence of the issuance of con-

vertible debentures, the terms of which had been established in such manner as to secure their rapid conversion into equity. The record as a whole does demonstrate that at times when the cost of new debt had been very favorable in comparison with current interest rate levels, the Bell System management did persist in raising most of its new capital by equity.[8] Thus, over the entire 17-year period of 1948–65, the total capital of Bell System increased from $6.8 billions to $29.8 billions and only a fourth of this increase in capital was obtained by net debt additions ($5.4 billion). The cost of new debt to the Bell System ranged from 2.72% to 3.75% during 1949–54, from 3.33% to 5.2% during 1955–59, and from 3.33% to 5.20% during 1955–59, and from 4.35% to 4.62% during 1960–65. If there was a reason behind policy that held down the company's indebtedness, it was a claimed "prevailing" opinion at the close of World War II that a depression, like the one in the 1930's, was inevitable after the War and an additional generally held viewpoint that high debt ratios for public utilities were unsound (obviously a viewpoint that had its origin as a consequence of the notorious Insull scandal of the 1930's).[9] It seems also to have been an idea of Bell System's management—and it still is—that somehow the telephone business is inherently riskier than other utility businesses, *e.g.*, the electrics, and therefore it is wise for the telephone company to carry less debt proportionately than the electric utility industry.

46. Admittedly, the investment climate underwent a pronounced change during the 1950's. The fears concerning the possibility of renewed depression virtually disappeared after the so-called "recession" of 1957–58. The view then began to take hold that sufficient safeguards were built into the economy to prevent the recurrence of old-fashioned type depressions. It became fashionable for investors "to appreciate more strongly the potential for growth and the likelihood that equity would continue to grow as a result of reinvested earnings" (T. 3460). So in the year 1958, the company, in line with the changed national mood, switched from its by then long-standing policy of paying $9 in dividends per share annually and not splitting equity shares. By the early 1960's, at least, there was a formally adopted policy of paying out in the neighborhood of 60% on equity earnings annually as dividends, so that dividends would rise with the rise in earnings. In 1966, possibly as a consequence of encouragement from questioning during the course of the hearings in the general rate investigation in Docket 16258, Mr. Scanlon announced Bell System's intention, in the light of changed circumstances to move its debt ratio from 33% to 40% and to reassess the situation thereafter. Subsequently, AT&T declared that once the 40% debt ratio limit was attained the company planned to test its ability to carry a still higher proportion of debt in its capital structure.

---

[8] To state the obvious, however, is by no means also to suggest that AT&T managers in years gone by may have had no reasons which at least they considered to be valid at the time for equity financing. The record does not provide a full evaluation of the context and motivations of such managerial decisions.

[9] The reasons for AT&T's low debt ratios in the past, advanced by Mr. Scanlon, may not be the whole story by any means. There is nothing in the record to show that governmental as well as corporate archives had been searched, or that any serious and sustained effort had been made by anyone, for probative evidence that might shed greater light on past corporate policies.

47. Oddly enough, from the point-of-view of achieving maximum cost savings in raising capital, AT&T's management could not have been more "off" in the timing of its changes in policy direction. Thus, there is no question that between 1964 and 1970, a period when the cost of corporate debt rose to the highest level at least since the American Civil War, the Bell System Respondents conducted their external financing exclusively by means of debt capital issuances, thereby increasing AT&T's debt ratios from 31.5% in 1964 and 1965 to 39.5 in 1969, and to 44.9% by the close of 1970. The rising costs of the new debt to the Bell System appear graphically as follows: 4.62% in 1965; 5.45% in 1966; 4.86% in 1967; 6.61% in 1968; 8.02% in 1969; and 8.73% in 1970. Obviously, the "embedded" cost of debt had also to rise and it, too, went up from 3.86% in 1965 to 5.78 in 1970. In citing these irrefutable data from the hearing record herein, the Examiner would stress that if the timing of the policy changes turned out to be erroneous, the management of the company cannot necessarily, *ipso facto*, be fairly condemned for such mistakes. For, indeed it may only have been guilty of timidity in pursuing what it considered to be a course of action that many (including government regulators), believed was the fashionable direction at the time to take. It may also have been waiting for some sign or indication of positive leadership from the government as to a more appropriate course. Or, it may merely have assumed that it was being "conservative" with other people's money. The record discloses other factors that will have to receive due consideration before any judgment on this state of affairs can properly be pronounced. Indeed, the Commission in the General Investigation of AT&T, Docket No. 16258, commented on this subject in its Interim Decision (9 F.C.C. 2d at p. 52) wherein it declared:

"Capital structure with too little debt may not only require the ratepayers to pay more than would otherwise be required for service, but also may adversely affect equity owners by reducing their earnings and dividends, as well as depressing the price of their stock. *A balance must be struck which, on the one hand, obviates the risk inherent in too much debt, and, on the other hand, avoids the unduly high charges to the public and adverse affects upon shareholders from too little debt.*" (Emphasis added.)

48. When it seemed to their advantage for it to be done, the Respondents appeared eager to compare their business, risks and capital structure with those of the electric utility industry. They may not, however, have the benefit of such advantages without consideration being given also to the detriments. And the evidence is clear that at times when interests costs were low, and AT&T did have low debt ratios, the electric utilities were financing themselves relatively heavily by debt. As stated in the Trial Staff's proposed findings, para. 177, in 1948 the capital structure of the Federal Power Commission Class A & B electrics amounted to 49.2% of debt, 13.9% of preferred, and 36.9% of common stock. Unlike the Bell System, the electric utility industry did not reduce the proportion of fixed charge capital (*i.e.*, debt plus preferred stock) in its capital structure in 1948. And in 1968, the latest year for which such data are available in the present record, the capital structure of the Class A and B electric utilities amounted to 53.8% of debt, 9.7% of preferred stock, and 36.5% of common stock.

49. In the light of data presented herein, the claim that Bell System's risks "inherent" in the business are somehow greater than those of the electrics was most unconvincing. It was accepted as virtually axiomatic by Mr. Scanlon that the revenues and earnings of the Bell System are more vulnerable to economic adversity than those of the electric utilities are, although concededly the latter do have a greater risk of public ownership takeover than does AT&T. The only factor advanced by Mr. Scanlon herein that he had apparently not put forward while testifying in the Docket 16258 proceeding on this subject (see 9 F.C.C. 2d, pp. 63, 64, and 75–83), was the enhanced prospect of competition from specialized common carriers that he believed would result from recent changes in the Commission's policies governing these carriers. Yet such competition would admittedly affect only the private line services of the Bell System comprising but 20% of its total business, and not MTS, which comprises some 80% of the business. Moreover, the risk factors confronting the electric utility industry have remained far from unchanged or static. Indeed, the Bell System cannot point to any thing comparable to the delays and protests regarding the use of new technologies (*e.g.*, the utilization of nuclear power), and the ecological difficulties, to which the electric utility industry is being subjected. Nor does it have the risk of widespread and immediate operational breakdown such as that suffered in the recent east coast blackout.

50. On balance, there is no evidence in the present hearing record that justifies disturbing the Commission's findings and conclusions, that "In fact, the evidence would indicate respondents to be less risky than individual electric companies" (in the General Investigation in Docket No. 16258, 9 F.C.C. 2d at pp. 82, 83) and that "By any reasonable test" neither are the short-term nor the long-term risks of the respondents at all greater than those of the electrics. Nor has any basis, in the form of probative evidence, been provided herein to justify fear that new entries and consequent competition in specialized common carrier fields will result in any significant impact either on AT&T's revenues or on the users of MTS, certainly for the near future and the year 1971 which concern us primarily in the present proceeding. *Cf. First Report and Order*, Docket No. 18920, *In the Matter of Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Service . . .*, adopted May 25, 1971 (FCC 71–547). In sum, the evidence establishes rather convincingly the relative risks of AT&T and the electric utility industry have not changed adversely to AT&T since the Commission's decision in Docket No. 16258 and that, in fact, considering the recently encountered problems of the electrics both in regard to the demand and the supply of electric power and the added requirements to safeguard the environment, which have naturally operated to increase the costs of the electrics, AT&T appears to be relatively less risky and more stable to a definitive extent.

51. Mr. Scanlon's testimony does not refute what has already been found, *supra;* and in some respects, indeed, it even tends to confirm what has been said. There can, of course, be no doubt from the data considered that the current embedded cost of debt to AT&T has been

affected by management's decision to reduce the corporate debt ratio after 1948 from 51% to the 30% to 40% range; and that, effectively, the debt ratio was in a 30% to 35% range for most of the 1949–65 period when interest rates were low, measured by current levels (Trial Staff's proposed findings, para. 182). The evidence also shows that the embedded cost of debt of the electric utility industry is less than AT&T's and that at least one factor accounting for this, according to Mr. Scanlon himself, was that of "timing", whereby the electrics borrowed more than Bell System did during periods of lower interest rates. Mr. Scanlon's statistics comparing, for the 1960–70 period, the cost of new "AAA" rated long-term bond issues of electrics with those of the Bell System, which do indicate that AT&T's debt issues sold at slightly higher yields than those of the electrics, despite AT&T's lower debt ratios and higher interest coverages, do not necessarily sustain his judgment that such margins are needed in order to sustain AT&T's competitive position in the debt market and to maintain continued investor interest in AT&T's bonds. The differences in the yields of new Bell System bonds for that period were calculated to have cost AT&T only 6 basis points, or .06 of 1.0% more than the new "AAA" rated bonds of the electrics. According to Mr. Scanlon, the largest differential, 37 basis points, occurred in the year 1969, which happened to be a year of rapidly changing and rising interest rates, when the timing of debt issuances affected debt costs significantly. In fact, the Respondents conceded as much, *i.e.*, that the differential that year was due largely to "timing". And where a simple average of debt costs was struck for the year 1969, *i.e.*, by months when "AAA" rated debt had been issued by both the Bell System and the "AAA" rated electrics, the differential amounted to only a single basis point, or 7.70% for Bell System issues, compared with 7.69% for the electrics (FCC Staff Ex. 40). The evidence also indicates that Bell System had to pay approximately 3 basis points more than the electrics on "AAA" rated debt during 1960–65 when its debt ratio was in the 30% to 35% range, and also during 1966–70 (1969 adjusted), when the debt ratio rose from 33% to 45%. However, the evidence also shows that in 1970 Bell System paid 10 basis points *less* than the electrics at a time when its debt ratio was the highest for the 1960–70 period. Mr. Scanlon finally conceded that "investors may not be willing to pay for the full margin of safety that the lower debt ratio afforded" (T. 3790).

52. If the rating agencies, Moody's and Standard & Poor's, are regarded as mirroring the judgment at large of the "investment community" (*Cf.* Trial Staff's proposed findings, para. 187), the data of record certainly indicate that the "community" looks upon AT&T as being less risky and higher quality holding (both stock and debt securities) than the electrics in general. Thus, as of the close of 1969, some $12 billions of outstanding debt of Moody's 24 Utilities was rated by it, 24.0% in amount, as "AAA"; 57.4% as "AA"; and 18.6% as "A". For 1970, $5.8 billions of electric utility debts were rated in terms of amount by Moody's, "AAA"—19.5%; "AA"—46.9%; and "A" or lower—33.6%. It was shown, also, that, out of 150 Class A and B electric utility companies, only 12 had a "AAA" rating by Moody's in 1970, while 65 had a "AA" rating, and 63 had an "A" rating.

Standard & Poor's, another investment adviser and publisher of investment advisory services, publishes ratings of common stocks in terms of dividends and earnings. Its ratings are intended to denote by letter symbols the relative stability and growth of earnings and dividends of the rated securities. In sequence, the four highest classifications by Standard & Poor's are A+ (highest), A (high), A− (above average), and B+ (average). AT&T common stock rangs A+, or the highest by Standard & Poor's. In contrast, Moody's which similarly ranks its 24 Utilities, shows that 7 of these companies are rated by it the "highest" (A+), 14 are rated "high" (A), one is rated "above average" (A−), and 2 are ranked B+ ("average").

53. Thus far, in speaking of "debt", we have been concerned primarily, if not exclusively, with so-called long-term debt. However, the "structure" of debt financing, *i.e.*, the extent to which it is accomplished by debt issues whose maturity is short-term or intermediate term, likewise affects the overall cost of debt. It is elementary that generally speaking investors require a higher interest rate in return for their agreement to hold debt for longer time periods. This principle is also described in terms of a so-called "positive" interest yield curve, reflecting increases in the cost rate of debt with the term (number of years to maturity) of the debt. The interest curve is decidedly "positive" at present. Indeed, the record herein discloses that during 1970 in the instance of 5 utilities (including AT&T, the parent company of Bell System), the cost of an intermediate debt issue of 5–7 years maturity was 56 to 99 basis points less than that of a long-term debt issue of the same quality issued by the same company on the same day. (There are 100 basis points in a full percentage.) Yet the evidence also discloses that only once in recent years, on May 10, 1970, when it issued $150 millions of notes maturing in 7 years at a cost of 7.79% and $350 millions of a 32-year debt issue at a cost of 8.78%, has Bell System apparently resorted to intermediate term financing. The explanation for this limited use of intermediate term type of financing seems to be that Bell System is guided by the financial principle that "if you are going to invest long you ought to borrow long" (T.3757), Bell System's investments averaging out, as they seemingly do, to 20 years or more. There is no doubt, as a general principle, that the issuance of debt as "long" as possible has the inherent advantage of facilitating the refunding of such debt when it becomes due by virtue of inflation and growth in the economy. (It will be repaid in "cheap money".) It is also clear that the use of intermediate type debt maturities by utilities was a development only of the last 3 or 4 years. However, according to Mr. Scanlon, in the light of the current market and its massive financial needs, the Bell System is certainly considering further use of the intermediate debt market. While there is undoubtedly truth in the proposition that refunding problems would arise if intermediate debt were substituted for long-term indebtedness; that, massively used, this form of financing could reduce AT&T's ability to take advantage of lower interest rates (if it should transpire that lower rates became available) in order to refund high coupon long-term debt having 5-year call protection, yet the requirement to refinance maturing long-term debt in an amount in excess of $500

million per annum will not be faced by Bell System until the year 1997. Also, it appears that maturities on long-term debt of AT&T will not exceed $225 millions in any one year during the balance of the 1970 decade. Thus, as the staff has indicated (Trial Staff proposed findings, para. 200), AT&T most certainly ought to be able to rely safely on at least some intermediate debt financing for a portion of its capital requirements for the next few years. And this should help at least to keep a lid on rising debt costs for the reasonably near future.

54. The evidence also shows that 38 of 147 electric utility debt issues during 1970 rated by Moody's had a maturity of from 4 to 7 years; and that the intermediate debt represented by these 38 issues provided in excess of a quarter ($1.5 billion) of the total debt capital ($5.8 billion) raised by the 147 electric utility issues.

55. In view of the discussion, *supra*, on the use that could have been made by the Respondents of intermediate debt financing, the Trial Staff's recommendation (para. 202 of its proposed findings) that Bell System be found to have been "unduly cautious" in not having pursued that approach more aggressively, is at least a sustainable position in the Examiner's opinion. The Hearing Examiner is disposed in his turn, to recommend that the Commission enjoin AT&T's management to train its sights on pursuing a future financing program that includes greater use of intermediate and short-term debt securities as well as long-term, giving due account, of course, to the refunding problems on long-term debt as these are likely to arise. Indeed, AT&T's "conservatism" in this area in comparison with the managements of the electric utilities, has undoubtedly contributed to the higher embedded debt cost that the ratepaying public must bear.

56. The Trial Staff, accurately and completely, summarizes the record facts (from Mr. Scanlon's testimony) concerning AT&T's current situation with regard to its short-term debt in paragraph 201 of its proposed findings. The latter paragraph is therefore adopted *verbatim* and is incorporated herein by reference. The Staff points out in the following paragraph (202) that with a continued growth rate of Bell System revenues at about 8 to 10% per annum, AT&T ought to be able to sustain its short-term debt at 1970 levels and that it ought not to reduce this level of indebtedness. It was also noted that as of February of 1971 the cost rate for short-term debt to AT&T was 5.4%. It does appear to the Examiner predicated on the data presently available and of record herein, that "By 1971 and thereafter, maintenance of [the 1970] level of short-term debt would not increase the ratio of such debt to total debt and ample coverage would be available" (Trial Staff, proposed findings, para. 202). At least, the level of short-term indebtedness ought not to be reduced unless, after further reflective consideration and analysis by AT&T's management, *cogent* reasons appear to justify such reduction.

57. As previously indicated, there was no dispute herein that the cost of embedded debt to AT&T at year-end 1971 will approximate 6% and that the cost of equity capital engendered the greatest amount of controversy. In the resolution of this controversy the Hearing Examiner finds himself to be in general agreement with the Trial Staff

109-045—73——3

as to the facts and methodology by which the controversy ought to be determined. As indicated previously, any method which merely accepts the Commission's findings on capital costs in its decision in Docket No. 16258 and adds some necessarily visceral reaction or subjective judgment factor purporting to reflect economic changes that have occurred since then would be inappropriate in the Examiner's opinion. As the Trial Staff put it (proposed findings, para. 204), the "cost of capital can and should be determined on the basis of present investment realities"; in other words, "by analysis of the return demanded now by investors as reflected in the investment markets".

58. Data in the record disclose unimpeachably that there has been a general similarity in the movements of the PE (price-earnings) ratios of AT&T's common stock and the electrics (Bell Ex. 34A, Attachment P; T. 3909–19). Indeed, in the current investment environment, the PE ratios of both have been approximately the same. Thus, for the year 1970 AT&T's PE ratio averaged 11.72, while for Moody's 24 electrics it was 11.39. In December, 1970 it was 12.1 for AT&T and 12.6 for the electrics; and on June 11, 1971 it was 11.0 to 11.4 [10] for AT&T compared with 10.7 for the electrics. Concerning this matter of PE ratios, however, it is of some importance to stress here that the Commission, beyond affording the Respondents the opportunity to earn a "fair" rate of return, is not legally obliged to guarantee that AT&T stock will have any particular price-earnings ratio or market-to-book ratios. Primarily, it is for the investor to determine for himself the PE ratio and the market-book ratio afforded AT&T's stock and its relative ranking in such respects to the electric utilities and the industrials. However, to the extent that AT&T's PE ratio might reflect insufficient investor confidence in AT&T's shares, to the point wherein the Respondents' ability to raise necessary capital might be impaired, the matter would, of course, be of some concern to the Commission, although the present record far from establishes so dire a circumstance.

59. Data in the record disclose that the market price of AT&T's common stock exceeded its book value by 25% or more for periods during the years 1967–69. In 1967 the month of highest average price was March; the highest monthly average for the year was $61.22; the average book value for the year was $39.50; and the ratio of market to book amounted to 155%. Comparable figures are shown in Bell Ex. 34A, Attachments M and N for the years 1968 and 1969 when the ratios of market to book came to 138% and 131%, respectively. As the Trial Staff indicates (Trial Staff proposed findings, para. 207), AT&T's omission to issue equity during that particular period could not very well be attributed to depressed quotations on its stock which would have resulted in "dilution" had new shares been issued, but rather to a mere preference by AT&T's management to refrain from issuing additional equity unless the market price went even higher than 25% above book, in order "to make the requisite contribution to growth and earnings" per share (T. 4062). On balance, it is quite clear that the 1967–69 period was not by any means a period of persistently depressed

[10] High-low AT&T common stock quotes ($46.50–44.88) on June 11, 1971 were divided by equity earnings of $4.04 a share for the 12 months ended May 31, 1971.

quotations for AT&T stock and that AT&T's management, pursuing its expressly desired end of not issuing new equity if the effect would be to dilute existing stockholdings, could certainly have done so at that time.

60. It is obviously of some consequence and importance how the terminology "dilution of equity" is defined for present purposes. As the Trial Staff points out (Trial Staff's proposed findings, para. 208), the AT&T common stockholders have preemptive rights to new equity issues and therefore the benefits accruing to them consist not only of cash dividends and capital appreciation, but also of the value of subscription rights to new equity issues and other types of rights, *e.g.*, the recent right to subscribe to a new convertible preferred issue, which may be granted to AT&T stockholders from time to time. It is thus clear that a definition of "dilution" as the impairment of the existing shareowners' interest by the sale of new stock below book value is overly simplistic and therefore not accurate. As the Trial Staff points out, "dilution" of equity exists in the instance of AT&T when the offering price of a new stock issue *plus the value of subscription rights* is less than the book value, and Mr. Scanlon's definition ("If we accept the 20 percent underpricing that would say that the minimum market price has to be 25% above book", which would result in net proceeds, excluding the value of subscription rights, equal to book value), at transcript, p. 4062, is simply not accurate. The Trial Staff illustrated its point with the simple example of an offer by AT&T of new common shares at $40 when book value is $45 and market price of $50 "before pressure" and $48 "after pressure", with one new share being offered for 20 old shares and each subscription right having a value of 40 cents. On the assumption that all subscription rights are sold by the existing shareowners to new investors, the staff points out that the company has in effect received $48 per new share from the new investors, compared with the prior book value of $45 per share, of which it has elected to invest $40 in the business and to distribute $8 per share to the existing shareowners through the subscription rights mechanism. Although the offering price per new share in this illustration, $40, was below book, there was no "dilution" here of the interests of existing shareholders. In practical effect the subscription rights will be exercised rather than sold by many stockholders and these will have received a definitive potential benefit measured by the market value of the rights while they decided to seek even greater possible benefits through enhanced claims to future earnings and dividends by adding to their existing shares additional new shares at the discount price.

61. From the discussion concerning "dilution", *supra*, it is abundantly clear that not only is Mr. Scanlon's definition of the terminology unduly restrictive and inaccurate, but that the Bell System *can* in fact issue new shares below book without actually causing "dilution" of existing shareholders' equity. It is also quite evident from examining the financial simulation model whose results are summarized in FCC Staff Ex. 46 that the effect on equity of the company's request for a 9.5% allowable return on total capital, with a 45% debt ratio, would mean substantial increases from the actual results of the year 1970 in AT&T's per share earnings, dividends, market price, and market to

book ratio. About all that can be said here is that a financial simulation model is an aid in decision-making on the basis of the assumed validity of the assumptions on which it is predicated. The evidence and economic and financial data in the present record indicate that the assumption, for one, of a required rate of return on book equity in excess of 12% is not warranted. Indeed, as the Trial Staff cogently implies (Trial Staff proposed findings, para. 211), with a current interest rate in the range of 7% to 8% pre-tax, even an equity return of 10% to 11% pre-tax is substantial to an investor in after-tax terms, in view of the tax advantages accruing to equity type income, wherein dividend income is partially excludable and favorable capital gains rates can be made applicable, in comparison with straight debt income which is fully taxable at ordinary rates.

62. It is quite true that the Commission commended Professor Myron J. Gordon in its decision in the Docket No. 16258 proceeding for his efforts in determining AT&T's cost of capital in that case by the use of an econometric model. It is also true, however, that the Commission did not predicate its 1967 rate of return determination upon Dr. Gordon's econometric model, for the Commission declared that it had not had an opportunity to analyze, evaluate and test fully his model insofar as fixing an overall rate of return was concerned (9 F.C.C. 2d, pp. 86, 87). In the present proceeding, AT&T's effort to utilize the Gordon model for its own purposes while continuing to disclaim its usefulness for the very kind of finite determinations that are required in this proceeding, renders it of no evidential value, even apart from the question whether AT&T's updating of this model was faithful to Professor Gordon's methodology. In all events, the attempt at updating involved the acceptance of assumptions that led inexorably to an exaggerated result (an *overall* rate of return to AT&T of 10.7%) which, in the Examiner's judgment, cannot be accepted as sound in the real world of investors' expectations today, in 1971. In passing upon this question, the Examiner, of course, believes he has complied with the Commission's Memorandum Opinion and Order in 28 F.C.C. 2d at 612, which rules merely that the data AT&T had offered in regard to the Gordon model was *admissible*. In the light of all the other evidence of record herein, the Examiner is unable to agree with the seemingly ridiculous result of the so-called updating; and that the updated model is of any value whatsoever "in placing in perspective the reasonableness of the rate of return sought by Respondents in this proceeding . . ." *Cf.* Bell System Respondents' proposed findings, para. 20 and 21.

63. The evidence shows that the number of AT&T shareowners has declined from the peak of 3,146,000 reached in 1968 to 3,067,000 in 1969 and to 3,054,000 in 1970. (The 1970 figure is more than the 2,825,000 shareowners in 1965.) Nevertheless, AT&T has by far the largest corporate family of shareowners and it is the third most popular institutional holding. The mutual funds, who most certainly are among in the most 'sophisticated' of investors, were net purchasers of AT&T common shares during the first three quarters of 1970, and during the fourth quarter a single such fund purchased 500,000 shares of AT&T stock. It is therefore not unreasonable to infer that the recent

slight decline in the absolute number of stockholders was counterbalanced by enhanced ownership of AT&T common stock by institutional investors. In all events, the slight decline in the number of shareholders provides no persuasive basis for determining the cost of equity capital to AT&T.

64. There is data (Bell Ex. 34, Attachment Q) in the record on the equity earnings of alleged "alternative investments" to AT&T's common stock for the 1960–69 decade. Three industry groups, *i.e.*, the industrials, the 5 largest telephone companies, and the electric utilities (FPC Class A and B, 130 electrics and Moody's 24 Electrics) are included in this study. As a matter of law (the Commission's Interim Decision in Docket No. 16258, 9 F.C.C. 2d, p. 77), the data for the industrials cannot be considered to be comparable. The comparison that AT&T advocates with the electric utility industry is based on the proposition, which has been rejected, *supra*, that AT&T's financial risk, considered in the light of an alleged increase since 1966 in its business risks, is now the equivalent roughly with that of the electrics and, therefore, that AT&T now deserves a rate of return on its common equity of 12 to 12½%, allegedly like the electrics. Also, there is no data in the record showing whether such equity returns of the electrics are "authorized" returns. Nor is it clear from the data supplied that the independent telephone companies are necessarily comparable in terms of equity to AT&T, so as to constitute an "alternative" investment.

65. Institutional investors, *e.g.*, banks, insurance companies and investment companies, have been characterized as being a dominant force in the market for equity securities today. Such institutional investors, it appears, hold a little more than a fifth of the outstanding shares of AT&T, and indications are that they account for half or more of AT&T share trading. The institutional investors are characterized as looking for a total return on investment from a combination of dividends and growth. The institutional investors are said to be seeking at least an 11% return on market price of AT&T stock, consisting of a 5% dividend yield and a growth rate of 6%. A return on book equity of 12½% is claimed (by Mr. Scanlon) to be necessary to permit realization of an 11% return on market price. The growth rate of 6% is said to be based on a review of market letters and discussions with representatives of institutional investors. The evidence includes 13 market letters from brokers and investment advisory services, which were interpreted by Respondents as indicating an average expected growth in the earnings of AT&T equity of 6.6%. The growth estimates in brokerage literature, however, are suspect as being biased on the high side by the professional optimism of firms which are interested in encouraging stock trading. In several instances the growth rate projected in market letters was apparently measured from the existing level of equity earnings to a higher level of equity earnings produced by a rising rate of return because of actual or expected rate relief, greater leverage, or other reasons. This is not the kind of growth rate which can reasonably be relied on for calculating the cost of capital; for that we are seeking a sustainable long-run growth rate. Also, it is considered improper to weigh, as Mr. Scanlon has, a market letter's growth rate estimate without at the same time giving consideration

to the same market letter's associated dividend yield. *Value Line*, for example, was interpreted by Mr. Scanlon, as forecasting a growth rate of 6.6% for AT&T common over 1970–1974. But at the same time *Value Line* was forecasting an associated dividend yield of 3.7%. The implicit capitalization rate-dividend yield plus growth—would then be 10.3%, accepting Mr. Scanlon's interpretation as to the growth rate. Another Bell System witness, Mr. Burns, claimed that the change in the price of AT&T common stock which must occur before investors in AT&T warrants can earn a minimal return shows that the investors in warrants are expecting a growth in price and earnings of AT&T common stock of over 6% per annum. Mr. Burns' arithmetic was not disputed by the Trial Staff but his interpretation was. What he calculated was a growth rate in the price of AT&T stock that must occur for investors in *AT&T warrants* to earn a minimal return. This growth in price could be achieved by a combination of changes in earnings and changes in the price-earnings ratio of AT&T stock. With sufficient speculative activity, indeed, growth in price can be attained *solely* by virtue of a change in the price earnings ratio of AT&T stock. Mr. Burns' arithmetic did not show what the expectations of AT&T warrant holders are with respect to growth in earnings on AT&T stock.

66. The Hearing Examiner considers the foregoing analysis, (*i.e.*, para. 65, *supra*), adapted from the Trial Staff's proposed findings (para. 217–219, inclusive) to be convincing and sound, from a financial point of view. In projecting investor expectations as to rates of growth for the purpose of establishing a reasonable and fair return on equity, one must, of course, carefully sort out *all* the pertinent factors, including the possibility, or probability, that the source or sources relied upon may have a particular 'axe to grind', in arriving at a particular result.

The Trial Staff's Presentation

67. The Trial Staff submitted the testimony of two expert witnesses on the important question of capital cost and fair rate of return for the Bell System: Dr. Stewart C. Myers, an Associate Professor of Finance at M.I.T.'s Sloan School of Management, who holds an M.B.A. degree in Business Administration and a Ph.D. in Finance from Stanford University; and Mr. David A. Kosh, President of Kosh-Glassman Associates, Incorporated, Public Utility Consultants in Washington, D.C., who holds a Bachelor of Science in Civil Engineering degree and Master's degree in Civil Engineering from Columbia University, and who has testified as an expert on the subject of fair rate of return in approximately 100 cases, involving electric, gas, telephone and telegraph, transit, gas producing, and airline companies, before various state public utility commissions and before the FCC, FPC, and CAB. Apart from the impressive professional credentials of these two witnesses, which alone justifies according a presumptively high degree of respect for their judgments, there was no indication that either of them enjoys any form of special relationship to, or dependence on, the carriers involved in this proceeding or, for that matter, to the Government which has retained their services. The Examiner was duly impressed by such circumstances, as well as by the

scholarship of their respective presentations. The fact that while they pursued basically similar methodologies in their analyses they yet differed from one another in judgment, as well as on certain analytic details in their studies, testified persuasively to their noncollaboration, to their independence and, broadly speaking, to the reliability of their studies. *Cf.* Respondents' proposed findings, para. 68. It is perhaps useful, in briefly summarizing the views expressed by these witnesses, to stress, at the outset, a basic philosophy that appears to permeate their analyses.

68. Dr. Myers explicitly stressed the role of *judgment* in determining AT&T's allowable rate of return and he allowed, quite candidly, that formal analysis predicated on finance theory cannot, and does not, provide an exact answer. Indeed, he observed, the temptation to rely on mathematical models that are employed in the analysis ought to be resisted. Formal analysis "is designed to support judgment, not replace it". It is an "aid" to judgment by uncovering implicit assumptions and correcting errors in logic. Similarly, Mr. Kosh, though perhaps not quite as explicit, recognized that "The problems involved in determining the cost of capital and its major components are in substantial measure matters of judgment". "Necessarily", he declared, "so many factors enter into a determination of fair rate of return that many judgments have to be made. If, at each point where a judgment has to be made, or where a question has to be resolved, the benefit of any reasonable doubt is resolved in the direction of a lower cost, then the result will tend to be at, or in the direction of, the lower end of the range of fair rate of return". Mr. Kosh claimed that his analyses of AT&T derived a cost of capital to the company that would provide a sufficient margin of safety above the minimum, "and this is essentially equal to the fair rate of return". It is certainly noteworthy that, applying similar, if not indeed identical, principles, each stressing aspects not stressed by the other, Dr. Myers and Mr. Kosh arrive at substantially different results as to a fair overall rate of return for AT&T. The problem, as the Examiner defines it, is to try to reach a determination in the light of *all* the evidence of record, including the opinions of qualified experts, which will probably be most acceptable to reasonable men in the circumstances of this proceeding as being a fair balance and recognition of both the interests of the company and its 3 million or so shareowners and the needs of the consuming ratepayers.

69. Dr. Myers concluded originally that AT&T's return on equity ought to be 10.5% and that the overall rate of return should be 8.5%. In making his analysis he accepted AT&T's capital structure as it was. He indicated, when asked to update his conclusions, that the cost of capital is sensitive to changes in interest rates and that consideration of the rise in long-term interest rates of .4 of one percentage point since the date of submission of his written testimony would lead him, *if no other factors were considered*, to revise his conclusion of the cost of equity to about 10.9% from 10.5%, and his estimate of the overall rate of return from 8.5% to 8.7% (T. 4161–63). These revisions, however, were not unqualified, because he did observe that other factors could well have changed since his written testimony was prepared

that could have affected his conclusions and that interest rates are only one factor (T. 4165). He was not pressed to identify such "other factors".

70. Dr. Myers, among other things, undergirded his judgment with a substantial study of the characteristics and past performance of AT&T stock compared with the market as a whole over various periods. He studied the matter of relative volatility of stock price changes, including AT&T's, in an effort to reach a reasonable determination of relative riskiness of AT&T in comparison with other stocks (*Viz.* FCC Staff Ex. 53, pp. 49–56 and supporting Attachments). As a consequence, he was able to reach a conclusion that AT&T's "market sensitivity" was .71 in comparison with a factor of 1.0 for the entire market. Dr. Myers also studied the total yield on a large number of stocks over several different intervals (*e.g.* 1926–65, 1945–65, etc.) and concluded that "investors are expecting a return of 10–12% from an 'average' security". However, since AT&T is less risky than the average, he concluded that it ought to provide a return in the lower part of the range. Whatever else one may say concerning these analyses, it is abundantly clear that they are supported by data and facts and that they do not depend for the conclusions reached upon merely visceral reactions or vague intuitions, however predicated they may be on the subjective experience of persons who are interested in the result.

71. There were some "infirmities" in Dr. Myers' methodology that the Respondents call attention to in their proposed findings, para. 70 *et seq.* However, in the Examiner's opinion the merits of this type of rationale outweigh the demerits, in terms of the delineation provided by it for the exercise of reasonable judgments on the intricate rate of return questions that have been presented. For example, in one "approach" that he adopted Dr. Myers utilized an estimated embedded debt cost of 6%, a market-derived cost of equity estimate applied to book value, and book weights for debt (45%) and equity (55%), and arrived at a conclusion that the rate of return allowance be set at 8.5%, as the midpoint of a range from 8.2% to 8.8%. As to this approach, Dr. Myers stated that use of embedded debt costs was not "necessarily" illogical and that a rate of return will result which "will not generally equal the firm's overall cost of capital", with the qualification, however, that exactly what he meant by "cost of capital" is carefully delineated and that the errors caused by the "traditional procedures were probably not serious" (T. 4280, 81).

72. Dr. Myers did state that he used earnings-price ratios to indicate a range for AT&T's cost of equity between 9% and 12.5%, and he did indicate that such ratios suggest AT&T's equity cost to be something "less than 12.5 percent, and probably greater than 9.7 percent". The Examiner does not agree with the Respondents' characterization, however, that the "limits of such ranges are so broad as to permit any discretionary estimate falling within it" (Respondents' proposed findings, para. 75); for, as the Respondents themselves point out in the very next sentence of their proposed findings, Dr. Myers found the earnings-price ratio useful as setting a lower limit for his estimate,

and, as Dr. Myers had stated, "it is very unlikely that earnings-price ratios overestimate AT&T's cost of equity capital".

73. Considered in perspective, the Hearing Examiner found Dr. Myers' testimony to be particularly helpful in the resolution of the return on equity question because of the light it casts on the relativity of risks. Dr. Myers recognized throughout that an investor in equity securities will require something more than the yield on debt securities as a compensation for added risk. Asked specifically whether he as an investor would buy common stock with an expected 9% taxable return when he could buy an adequate secured corporate bond at 7.8%, he responded quite frankly that he *would* if the stock were "safe" enough. While he expected something more from a stock than from a bond, how much more would depend on the question of risk (T. 4290). Applied to "typical securities", not necessarily to AT&T though, he did not regard a spread of 2 percentage points between high-grade corporate bond yields and the cost of equity capital to be a reasonable spread (T. 4291). There is data (Bell Ex. 56 compared with Attachment B to Dr. Myers' direct testimony) that does indicate that the compound average rate of return on common stocks (dividends paid plus capital gains) amounted to 9.3% in comparison with an average yield of 3.59% on high-grade industrial bonds and 3.65% on high-grade utility bonds over the 40-year period January 1926–December 1965, and a spread of 11.49% between them over the 6-year period December 1960–December 1965. A weakness in this presentation of statistical averages is the lack of consideration therein shown to differences in risk, as well as the comparability to the present of these periods. But while it may not be valid to establish or prove an exact spread between equity returns and bond yields, the Examiner is persuaded that this study and comparison in the record does have some value as proof that over a long period of time the "spread" between equity returns and bond yields substantially exceeded two percentage points and, therefore, that equity investors in general have historically considered the risks in equity type investments as justifying a *minimum* of 2 percentage points in terms of the return on equity *vis a vis* what they could obtain by buying bonds.

74. Dr. Myers recommended what he described as the "conscious use of a regulatory lag", in providing for flexibility in establishing the allowable rate of return. Explaining, he urged that the best possible estimate of the appropriate rate of return allowance for AT&T ought to be made in the present proceeding, so that the company could set its rates, or the prices for its services, in order to earn that rate on its existing assets under existing conditions of cost. Once such a rate is established, "regulatory lag" (which has always existed between one rate proceeding and the next) ought to be employed, he urged, consistently with what the Commission had already done in the General Rate Investigation of Docket No. 16258, where it authorized a rate of return between 7% and 7½% overall (T. 4163, 64). However, *this time the Commission should explicitly set the range with a view to encouraging and rewarding efficiency and good management and to let the AT&T shareowners absorb some of the business risks*, and certainly not to give the company a license for monopolistic or discrimina-

tory pricing. The length of the "lag" must be permitted to depend on circumstances. If, for example, AT&T during the year 1972 earned a particularly favorable return due to unusual efficiency or excellent management, Dr. Myers would let his "lag" continue, while of course, he would not do so if it appeared that AT&T was earning an excellent return because of discriminatory pricing practices (T. 4167, 68). Even more precisely, Dr. Myers expounded the following illustration: that the allowable rate of return to AT&T on equity is fixed at 10½%; that the Commission has determined that a reasonable 'range' for return on equity would be plus or minus 2%; and that, if it developed in 1974 that Bell System was actually earning only 8.3%, he would consider that to be a sufficient justification for the Commission to institute a new rate proceeding. However, he thought it wise for the Commission to institute new proceedings at 5-year intervals even if AT&T's return on equity remained within the minus or plus 2% range that he envisioned (T. 4169, 70). Dr. Myers was careful to state that the limits he was here suggesting were not advocated as "precise restraints" but merely in order to provide an idea as to what he considered reasonable (T. 4170). Explaining further how this utilization of regulatory lag would provide an incentive to AT&T management to be efficient, Dr. Myers points out, illustratively, that if the company were able to develop a new very efficient method of routing long-distance telephone calls, it would be encouraged thereby to install such a system, because it would be assured in advance that it had an opportunity now to actually realize returns higher than those established as "allowable" by the Commission herein. Later on in his testimony (T. 4351, 52), Dr. Myers spoke of a range of 1% above or below the authorized rate of return, which he recommended be fixed at 8½%, instead of a range of 2% plus or minus applied to his recommended 10½% rate of return on equity; and he indicated that if, instead of fixing the authorized rate of return at 8½%, the Commission merely declared that the rate of return authorized to Bell System is established as between 7.5% and 9.5%, he would regard this to be consistent with his point of view (T. 4352). He also stated that "efficiency" in the context of his point of view meant efficiency of management to minimize operating costs, "being adventuresome in technologically advanced techniques", and not the elimination of complaints regarding sloppy telephone service (T. 4353, 54). Nevertheless, an incidental benefit to the public of improving technology designed to reduce operating costs might also be improvement in service (T. 4354, 55).

75. The Examiner has devoted considerable space and time herein to Dr. Myers' recommendation on the use of "regulatory lag". He has done so for two reasons: first, because his review of the record led him to conclude that the Respondents' characterization of this recommendation as "an apparent effort to overcome the admitted defects of his [Dr. Myers'] second approach" is unwarranted by the record and unfair to Dr. Myers; and second, because the recommendation appears to have practical merit which the Examiner believes the Commission should carefully consider in its own review of the instant record. The Examiner would also point out that the second expert retained by the Commission herein, when questioned on this matter during his cross-

examination, appeared to agree that this recommendation was worthwhile.

76. The idea of making "conscious" use of regulatory lag was presented at first to witness Kosh in terms of seeking to provide an "incentive", when a fair rate of return is set, for the company to try to attain that rate level by efficiency. To Mr. Kosh the question depends on the kind of "incentive" intended. If the "incentive" was to provide a margin above the allowable rate of return it may be questioned whether this would really be an "incentive". The next question raised by Mr. Kosh is how to measure management "efficiency". He pointed out that in competitive business this can be done by using a company's earnings as a barometer; whereas in the instance of a public utility, which can ask for rate increases utilizing actual operating costs as a basis, the management may be asking the regulatory agency to bail it out for its inefficiency by approving a rate increase. Thus, speaking generally Mr. Kosh opined that rate increases in regulated industries and the use of high rates of return are poor methods of providing management incentives (T. 4545, 46). Notwithstanding this general conclusion, however, Mr. Kosh, when questioned further, perceived favorable advantages in the idea of specifically utilizing "regulatory lag" as a management "incentive". Instead of fixing the company's fair rate of return at, for example, 8.5% and telling it at the same time that if it actually earned 9.0% due to "efficiencies" it would not be put into another rate hearing, Mr. Kosh would tell the company that its authorized rate of return is neither at the "very bottom" nor at the "very top", and that, since everyone knows there is "regulatory lag", the Commission should simply let the company go ahead between rate cases to do its utmost to improve its *actual* rate of return and pocket the results. In other words, he stated, "Suppose the Commission will say we will give you X percent. Let us assume that rate cases come every three or four years. If you fellows are really efficient . . . [and] you earn above this, we are not going to retroactively take it away from you . . ." (T. 4547, 48).

77. Mr. Kosh's principal (though far from the sole) contribution to the present record was his determined advocacy of increased debt (to 50%) in Bell System's capitalization. His views are very tersely summarized in the Trial Staff's proposed findings, para. 143–146, inclusive. Like Dr. Myers before him, Mr. Kosh used the so-called "DCF" (Discounted Cash Flow) method as an aid in estimating the cost of equity capital. His ultimate conclusion, predicated on the adoption by AT&T of a policy directive to raise its debt ratio to 50% and upon an estimated equity return of 9.75% was that *overall* cost of capital to Bell System is 7.9%. Next to his views on capital structure, the most controversial aspect of Mr. Kosh's testimony related to his estimate on the cost of equity capital, which (9.75%) was seemingly on the low side when compared with Dr. Myers' estimate (10.5%) and the estimates of AT&T's partisans and proponents. The validity of the results obtained by use of the DCF formula of course depends on the reliability of the underlying values used as components of the formula. For estimating the sustainable, long-run growth used in his DCF formula, Mr. Kosh referred to data on 5 selected Bell System operating com-

panies as the best indication of future investment expectations, which he concluded were 5.1% for dividend yield (after an allowance for "pressure") and 4.5% for growth. He added 0.15% to his calculated 9.6% estimate of the cost of equity capital to AT&T, bringing it to 9.75%. The constituents of the formula used were:

	Percent
1. Relating to dividend yield:	
(a) Dividend yield (before market pressure)	4.84
(b) Allowance for market pressure	.25
2. Relating to growth:	
(a) From retained earnings (9.75% × 40% earnings retention rate)	3.90
(b) From sales of new stock in excess of book	.60
3. Margin of safety	.15
Total	9.74

With the present dividend payout policy of AT&T of 60% and a dividend yield of 4.84%, Mr. Kosh's analysis would produce a price-earnings ratio of 12.4. In Mr. Kosh's opinion, his approach ought to have the effect of permitting the market price of AT&T shares to be at all times at least 10% above book and in good times to rise to at least 120% of the book value, perhaps even as high as 140% or 150%, provided that the company actually realized its authorized rate of return and in the absence of a major change in the money market. While acknowledging that theoretically there is an increase in risk for equity capital as the proportion of debt in the capital structure increases, Mr. Kosh considered an analysis of historical data indicating that with an equity ratio of from 35% to 50% capital structure has little or no effect on the cost of equity.

78. Since one of the basic considerations in capital structure is safety, Mr. Kosh carried out a number of analyses to test the safety of a Bell System capital structure composed of 50% debt. Mr. Kosh concluded that if a utility could maintain 2 times coverage (post-tax) during a depression as severe as that of the 1930's with a 50% debt ratio, it would have adequate safety and that AT&T would meet this test with an overall return of 7.9%. Such a debt ratio (*i.e.*, 50%) would also be safe when compared with that of certain electrics, in that stated proportions of revenue losses or increases in expenses would not impair the two times coverage. Studies were also carried out on the variability of Bell System earnings from year to year and in comparison with certain electrics. These studies showed that if the Bell System suffered a year to year decline in earnings as severe as any it ever had (36%), its coverage would still be 1.9 times, and that the electrics with substantially more debt, have proven quite safe. Finally, Mr. Kosh argued that if the Bell System had had a 50% debt ratio in the years 1948–1970, ratepayers would have saved $10 billion at then prevailing equity rates of return. He also calculated that with an increase in interest coverage from 2.6 to 3.6 times $5 million annually in interest charges overall to the company would be saved, but that the cost to ratepayers would be $670 million in additional charges annually.

79. It is noted that Mr. Kosh, in his written direct testimony, undoubtedly underestimated substantially the cost of $2,935,000.00 in additional debt financing for the year 1971 at an interest rate of only 7%; that he assumed, with little apparent justification, a 6.15% cost

for $980 millions of debt to be issued after 1971; and that he made no upward adjustment for the substantially higher level of current debt costs. On cross-examination, however, he did recognize that the cost of long-term debt could go to 7.25 or 7.50% by the end of 1971, and he calculated that if it went to 8% it would only raise embedded debt cost to 6.06 or 6.05% (6.01% at 7.50%) (T. 4590–92). And he had to concede, subsequently, that interest costs appeared to be rising and that they *could* get back to 8% by year-end for "AAA" rated utility bonds (T. 4599–4602).[11] *Cf.* Respondents' proposed findings, para. 81. Indeed, Mr. Kosh acknowledged that there is a relationship between the level of interest rates and the cost of equity capital and he doubted there would be any substantial *decrease* in interest rates in 1972–73 from the level of the past two years.

80. In order to arrive at his estimate of AT&T's cost of equity capital, Mr. Kosh applied a simpled discounted cash flow (DCF) method derived from the equation: the "capitalization rate" ("i") equals the "current dividend yield" ("Y") plus the "anticipated annual growth rate in dividends per share" ("g"). In doing so, Kosh readily admitted that, while what is needed is a reliable estimate of what the market is anticipating in terms of future earnings growth, the problem involves making "subjective" determinations. However, by "subjective" in this context he certainly did not mean plucking things out of the thin air. On the contrary, as the Examiner understood Mr. Kosh's testimony (paraphrasing him), Mr. Kosh was suggesting that one should minimize the element of subjectivity by employing careful logical analysis in relation to a "data base" consisting of solid information. As Mr. Kosh had stated in another proceeding (Respondents' proposed findings, para. 84), "All of the methods in use that I am aware of are at best aids to judgment and they have to be considered as such", and the DCF methodology is nothing more than that. The Respondents do appear to the Examiner to have pointed up correctly in their proposed findings at least some infirmities in the DCF approach that deserve to be considered herein, to the extent that application of the formula without appropriate exercise of judgment may well lead to unfair results. For example, the "current dividend yield" component (or "y" factor) in Mr. Kosh's DCF equation was calculated as the ratio of the amount of dividends per share to a market price per share. Thus, he computed AT&T's dividend yield to be 5.09%, comprising a dividend yield of 4.85% plus a 0.24% allowance (5% of the dividend yield) for financing and "pressure". As the Respondents have pointed out in their proposed findings, para. 85, this computation is susceptible to variations of 1.7 percentage points depending on the market price employed in the calculation. They correctly observe that the computation of the current dividend yield in the DCF equation of Mr. Kosh is understated by at least 0.7 to 1.7 percentage points. Illustrating this, if the market price used to compute a current dividend yield was the average during the year 1970, or $46.75, Mr. Kosh's divided yield of

[11] As of the first week of August, the interest rate on telephone company debentures had climbed to 8.20%, when on August 3rd $100 million "AAA" rated 40-year debentures of Indiana Bell were sold to an underwriting group at a cost of 8.27%. See New York Times, Wednesday, August 3, 1971, pages 43 and 48.

5.1% on an implicitly assumed market price of $53.70, would be 0.7 percentage point higher (5.8%). The yield using the 1970–71 low price, $40.38, would be 1.7 percentage points (6.8%) above that used by Mr. Kosh. They also point out that in contrast to Dr. Myers, who also applied the DCF methodology and who utilized a current market price in computing yield, Mr. Kosh employed an average market price dating back to the year 1968, which cannot be justified as representing a "current" dividend yield, particularly when such a price significantly exceeds current market levels.

81. The determination of the "anticipated annual growth rate" (or "g" factor) component in the DCF formula, which does play a "crucial" role in the computation of the capitalization rate by Mr. Kosh, depends on the assumptions one is able to make as to the growth of dividends per share (T. 4539, 40), and as to such things as possible changes in the dividend payout ratio and changes in the rate earned on book value in the event earnings per share are used as a so-called "proxy" (T. 4540). For his analysis Mr. Kosh, for example, assumed that the dividends paid per share would necessarily grow in proportion to the growth in earnings per share, and he relied on past experience to estimate the growth rate. Indeed, it does appear, as the Respondents have stated (Respondents' proposed findings, para. 86) that the calculation of the "g" factor in his formula depends on Mr. Kosh's assumption that historical growth ratios provide a definitive measure of investor expectations for the future and on a further assumption that investors expect AT&T's future growth to be at a rate lower than it was during the 1957–70 period. Such assumptions as these could be validated by the passage of time and, to the extent that history provides a key to the future, they are not illogical or taken from thin air.[12] But the Respondents do point to data in the record (Respondents' proposed findings, para 87) which are at least indicative of a possible underestimate of the so-called "g" factor by Mr. Kosh. It is certainly arguable from facts both Mr. Kosh and Dr. Myers have themselves presented that the substantial rise in interest rates since 1966 has resulted in materially increased investors' expectations of growth rates and in their required return on equity capital. Mr. Kosh conceded, moreover, that, as leverage increases through an increase in the debt ratio, there ought to be an increased rate of equity earnings. Yet, it is not clear that he has made a sufficient adjustment taking account of the additional leverage built into AT&T's capital structure since 1966.

82. Mr. Kosh's analysis is criticized by the Respondents (Respondents' proposed findings, para. 88) for not utilizing the equities of the electric utilities in his analysis of alternative investment opportunities.

---

[12] As the Trial Staff pointed out in their Reply to the Respondents' proposed findings, the record does show that the rate of AT&T's growth in book value per share was: 1950–70—4.2%; 1954–70—4.56%; 1957–70—4.85%; 1962–70—4.49%; and 1965–70—3.63%. From this one can reasonably deduce, as the Trial Staff has, that Mr. Kosh's growth rate component of 4.5% is "liberal in that, compared with actual experience, it is very close to the top of the range of realized growth rates". As with most statistical studies, however, it can be perilous to try to extrapolate figures from a past period in this manner. It is not explained in the record, for example, why Mr. Kosh did not use the 4.85% rate of growth for 1967–70 as a plausible measure of future rate of growth. In a footnote, the Staff points out that the annual growth rate for 1972–73 shown by their financial simulation is about 4.75% which they claim is "consistent" with a long-run growth rate of 4.5%, considering there will be some dilution, for a time, as a consequence of the exercise of warrants to purchase common stock of AT&T at $52 and conversion of the June 1971 preferred stock into common at $47.50.

As has been indicated, however, the equities of the electrics are not comparable in risk to AT&T equity and, consequently, they are not considered to be appropriate alternative investments. (Mr. Kosh did analyze the cost of capital to 5 operating Bell System companies as alternative investment opportunities of comparable risk to AT&T's common stock.)

83. While stating that the flow for any growth rate used in the DCF formula ought to be 4.85% based on Mr. Kosh's study of growth during the 1957–70 period, the Respondents argue, unpersuasively, the Examiner finds (when the matter is subjected to analysis) that "the more objective market indicators of investor expectations" as disclosed by the price of AT&T warrants "suggest a growth rate of 7.2 to 7.5 percent". As the Trial Staff appears correctly to point out (Trial Staff Reply Brief, para. 33), the growth rate in the DCF return is an annual compound rate of growth in per share dividends, earnings and market price. The 7.2 to 7.5% growth rate contended for would mean that these three factors (dividends, earnings, market price), per existing share, would have to double every 10 years. Solid evidential support for such a rapid rate of growth is completely absent. What an AT&T witness, Mr. Burns, calculated was the change in the price of AT&T stock that must occur for investors in AT&T warrants to earn a minimal return. With sufficient speculative activity, the change in price of AT&T stock required by warrant holders could be attained solely by changing the price-earnings ratio. Such calculations by Mr. Burns do not indicate what the expectations are of AT&T warrant holders with respect to growth in earnings of AT&T stock.

84. It appears that the Respondents would combine a current dividend yield factor (after market "pressure") of 5.8 to 6.1% with a growth factor from 5.2 to 7.9% to produce a DCF return in the range of 11 to 14% and adjust the return still further upward "to determine the rate to be applied to book value in order to permit investors to realize their required return on market value" (Respondents' proposed findings, para. 89). The Trial Staff in its Reply Brief, para. 38, offers some calculations "to show the utter implausibility of respondents' ultimate result". In 1970, it observed, the average market price of AT&T common stock was $46.75, earnings per share were $3.99, dividends per share were $2.60, the dividend yield before market pressure was 5.56% and after market pressure 5.8%, and the PE ratio was 11.7. The current book value of AT&T equity, says the Trial Staff, is known to be about $45 a share and Mr. Scanlon, *supra*, argued that a 12½% return on book was necessary to produce a 11% return on market. If the Respondents' suggestions, *supra*, were to be adopted, current earnings at the claimed lower limit of return would be $5.63 per share (book value of $45×12½%); the dividend would be $3.38 with a continuation of the 60% dividend payout policy; the AT&T market price would be $60.79 (dividend of $3.38 divided by dividend yield before market pressure of 5.56%); and the PE ratio would be 10.8! In other words, as the Trial Staff points out, an increase of some 40% in the earnings per share would at the same time be accompanied by a decline in the price-earnings ratio which investors were willing to pay at the alleged currently depressed earings level. On balance, notwithstanding the

Staff's somewhat partisan illustration and characterization, the Hearing Examiner considers it to be of more than merely passing importance that state regulatory bodies (*e.g.*, In re *Ex Parte South Central Bell Telephone Co.*, 87 PUR 3d 498) have approved Mr. Kosh's utilization of the DCF method as "a rational approach to a complex problem" and that this Commission has characterized the DCF as the "method of combining dividends with estimated growth" which "has basic merit" (*Western Union Telegraph case*, 27 F.C.C. 2d 515, at 527). It is at least a useful tool, provided it is used with discretion and provided further that the underlying assumptions in the formula are critically evaluated in each instance.

85. As indicated above (para. 77, *supra*) Mr. Kosh advocated an increase in AT&T's debt ratio to 50% and he predicated his conclusions as to a fair rate of return on a hypothetical capital structure for Bell System of 50% debt and 50% equity. The Respondents have expressed trepidations that adoption of this suggestion would result in "a serious deterioration of Bell's credit standing" (Respondents' proposed findings, para. 94). The Examiner is satisfied that the evidence in support of this fear is insubstantial; that the record indicates, at the very least, that in the rather unlikely event AT&T may have its "AAA" debt rating reduced to "AA" there is yet no basis for reaching any conclusion that such a downrating would increase Bell System's debt costs significantly; and that there is certainly no convincing proof that a downgrading of the debt of a minority of operating subsidiaries would materially impair Bell's capacity to attract new debt capital at reasonable cost.

86. On the other hand, the Examiner regards Mr. Kosh's argument to the effect that, if only Bell had adopted his recommendations regarding its capital structure several years ago (in 1948), consumers would have realized substantial savings, as unconvincing, if only because, as hindsight, this is a woefully incompletely supported, yet serious accusation which might be applied fully as much to governmental regulators, state and federal, as to Bell Managers of the past. There is nothing in the present record that would indicate that anyone other than Mr. Kosh was sufficiently perspicacious over the intervening years to raise serious questions until now regarding the propriety of Bell System's capital structure. Before such *ex post facto* considerations are given effect in fixing a fair rate of return for AT&T in 1971, one should be careful to make sure that all the relevant 'dead horses' of the past are resurrected and that all who may have been responsible are afforded an opportunity, completely, to explain.[13] Clearly, for practical reasons, this is an impossibility. Therefore, except for an exercise of arithmetic, demonstrating that debt capital is generally cheaper than equity capital, the Examiner unequivocally rejects this hindsight effort of Mr. Kosh as an incomplete, and essentially unfair, wrenching from context of historical statistics, to prove a point that is in all events unnecessary to the decision in the present proceeding. Yet,

[13] While one may agree that simple arithmetic shows that consumers would have realized substantial savings, etc., the problems presented is this proceeding cannot be justly resolved merely by accepting the arithmetic. One would at least have to know, first hand, why the management 20 years ago decided to do what it did.

viewing his study and testimony as a composite whole, without regard to the *ex post facto* portion, the Examiner, *supra*, has found convincing record support for Mr. Kosh's proposition that 50% is a reasonable, and entirely safe debt ratio *today* for Bell System, and that if the management were now to change its current policy, which calls for a ratio of between 40 and 45 percent, and start working towards a 50% limit, it will help even with today's high interest rates, to keep total capital costs down while at the same time perhaps benefiting shareowners and the general consuming public alike. This is definitely *not* to say that a 50% limit is to be 'rigidly' sought and 'rigidly' adhered to, but only that a ratio in the range of 48% to 52%, with 50% as the midpoint, appears to be safe and reasonable to the Examiner under current economic conditions as reflected in the present record. The decision of when to go, and where to stop, within that range, or if conditions should change in the meantime so that it would no longer be appropriate to pursue such a goal, to reverse gears again, is entirely management's to make. But because the Examiner is convinced that management should have allowed the Bell System's debt ratio to rise to the 48% mark that was originally—prior to the June issue of equity shares—contemplated, he believes the ratepaying public ought not to be charged with any additional costs due to the recent policy switch. Accordingly, he proposes to apply a 48% debt ratio in computing an overall fair and reasonable rate of return for AT&T.

87. The Examiner agrees with the Trial Staff that the Respondents supported their position that AT&T's equity earnings are inadequate to attract capital on fair terms on the relationship between AT&T's market price and book value. Therefore, paragraphs 43–49, inclusive, of the Respondents' proposed findings on this subject are hereby adopted and incorporated herein by reference. He also, perforce, agrees that it is desirable for the market price to be higher than the the book value of the shares. And he likewise agrees that it is no part of the responsibility of AT&T's regulators to undertake to assure that the market price for AT&T's shares is, in fact, maintained above book value (Trial Staff, Reply, para. 43). However, the truth of the matter is that there is no scientific way of fathoming the reasons for the presently depressed market prices for AT&T, or the extent to which regulatory action may have an effect. The record in the present proceeding contains only suppositions explanatory thereof, such as inadequate earnings, service difficulties in New York City, possible investor awareness of what the Trial Staff chooses to characterize as "management errors", and the "considerable pressure overhanging AT&T's common stock from the outstanding rights offering of last year and the sizeable issue of convertible preferred that was made on June 2, 1971." (Trial Staff, Reply, para. 44.) And it may, indeed, be the case that the market price of AT&T's shares has been inhibited purely and simply by the same economic factors that caused the Dow Jones Average to decline some 100 points by July and August 1971, and the Utility Average to remain generally in a lagging, depressed state. The fact of "regulatory lag" presumably, is not lost upon astute and sophisticated investors who may be shying away from the regulated utilities merely because non-regulated companies are better able to keep in step with the cur-

109-045—73——4

rent rapid rate of inflation.[14] On the basis of the present record, unfortunately, there is no assurance that any particular increase in the Bell System's allowable rate of return will have any measurable effect on the price investors will be willing to pay for AT&T's shares under current economic conditions. Possible a way to illuminate the situation, and thereby to expose the truth, would be for the Commission openly to espouse Professor Myers' philosophy on the "conscious" utilization of "regulatory lag", at least as an experiment. It may be noted, incidentally, that neither the Trial Staff, nor the carriers, nor any of the other parties hereto (for that matter) has seen fit to come to grips in any depth with this important aspect of Dr. Myers' testimony. By their silence the Examiner may appropriately infer that none of the 31 parties to this proceeding objects at least to a "trial run" of the "conscious" use of "regulatory lag".

Respondents' Claimed Operating Results and Amount of Required Rate Adjustments

88. In paragraphs 103–108, inclusive, of their proposed findings, the Respondents review certain financial and operating data in the record and indicate the calculations on the basis of which they have reached the conclusion that they now require a 9.5% overall rate of return. While the Examiner does not agree with this ultimate conclusion, and with all of the intermediate steps through which it is derived, he yet considers the data expounded in these paragraphs to be accurate as far as they go, relevant and material to the rate of return issue, and helpful to the Commission in the process whereby it will arrive at a fair and equitable solution in this proceeding. Therefore, the cited paragraphs are adopted to the extent indicated below:

"103. Mr. W. W. Brown, Director-operating Results of the AT&T Long Lines Department, presented the financial and operating data for the Bell System interstate operation. . . . The data for 1970 and prior years were the recorded results for those years, and the data for 1971 represent the projected view for that year prepared in the regular course of business . . ."

"104. A summary of the Bell System interstate messages, average revenue per message, revenues, expenses and average net investment for the years 1969, 1970 and 1971 is tabulated below. The 1971 figures are based on the rates in effect prior to January 26, 1971, and do not reflect the effect of the Ozark Plan change in separations, which became effective January 1, 1971. . . .

Financial and operating data relating to Bell System interstate services

[In millions except for item (2)]

	1969	1970	1971 view
(1) Messages	2,473	2,714	3,020
(2) Average revenue per message	$1.87	$1.81	$1.85
(3) Total revenues	5,011	5,276	5,931
(4) Total expenses	4,092	4,352	4,886
(5) Average net investment	11,285	12,296	13,605

[14] If and when the Administration in Washington succeeds in bringing the current rate of inflation under control, it is not unreasonable to anticipate a renewal of investor confidence in utility shares.

"165. The computed ratios of net operating earnings to average net investment for those years are—1969: 8.1 percent; 1970: 7.5 percent; 1971 view (reflecting the impact of the Ozark Plan): 7.2 percent. . . . The effect of the Ozark Separations Plan, adopted by the Commission in Docket No. 18866, was to transfer, as of January 1, 1971, $130 million in annual revenue requirements from intrastate to interstate operations (27 F.C.C. 2d at 154). This $130 million increase in revenue requirements is the equivalent of a reduction of 0.5 percent in the interstate rate of return for 1971. . . . The view for the year 1971 was based on a forecasted upturn in business over that experienced in 1970. If this forecast does not materialize, and if expenses in 1971 rise as much or more than revenues, the interstate return will be lower than the expected 7.2 percent. . . . With a 7.2 percent overall rate of return, a 6 percent embedded cost of debt, and 45 percent debt ratio for 1971, the resulting return on equity under the 1971 view (before any rate increase) would be 8.2 percent."

"106. The amount of the rate adjustments filed on November 20, 1970 to achieve a 9.5 percent return on total capital was determined on the basis of the then view of 1971. . . ."

"107. With an average net investment devoted to interstate service (prior to the Ozark Plan effect) in 1971 amounting to $13.6 billion for 1971, it requires $26.2 million of revenues to change the rate of return by 0.1 percent. . . .* The rate filing on November 20, 1970, was estimated to increase Bell System interstate revenues by $385 million and produce net cost savings of $160 million, for a total of $545 million in revenue requirements at 1971 calling volumes (27 F.C.C. 2d at 152).* Thus, the $545 million would have increased the rate of return in the 1971 view by 2.1 percent, from 7.4 percent (which was the view at the time of the initial rate filing) to 9.5 percent. . . . The revised tariff changes in MTS rates that became effective January 26, 1971, pursuant to the special permission granted by the Commission, amounted to an annual increase of $250 million in net earnings before taxes $175 million revenue increase plus $75 million associated cost savings). . . . A $250 million increase has an effect of 0.95 percent on interstate rate of return (*i.e.*, $250 million divided by $26.2 million per 0.1 percent change). Accordingly, the revised tariff changes had the effect of increasing the 7.2 percent rate of return in the 1971 view to 8.15 percent. In order to improve the overall return to the 9.5 percent level, therefore, an additional increase of 350 million is required (i.e., an increase of 1.35 percentage points at the rate of $26.2 million per 0.1 percentage point)."

"108. Mr. Hough testified that AT&T's rate proposal, based on the 1971 view of operating results, reflects expense levels that are representative of the period during which the rates will be effective. . . . Any interim rate adjustments which may be ordered at the conclusion of the rate of return phase of the proceeding may, according to the Commission's procedural order, be subject to accounting and refund pending completion of the entire proceeding. . . . Further, any determination in Phase I of this proceeding as in Docket No. 16258, is related to financial conditions revealed by the record for the test period conditions and consequently is applicable only so long as such conditions continue. . . . The Commission has established procedures for dealing with relevant changes in economic conditions that might have an effect on any determination in this proceeding. As the Commission stated in Docket No. 16258, 'we shall continue within the framework of our continuing surveillance, to be responsive to all changes in economic conditions which may require reevaluation of respondents' earnings and revenue requirements and will take appropriate action in light of then existing conditions'" (9 F.C.C. 2d at 971; also 9 F.C.C. 2d at 963–64).

Bell System's Construction Program and Quality of Service

89. The Trial Staff's proposed findings include a substantial number of paragraphs that are devoted to a rebuke of Bell System's manage-

"*When the Ozark Plan is reflected in the interstate rate base, the average net investment for 1971 will increase by the amount of investment transferred from intrastate to interstate. As a result, the $26.2 million figure required to change the rate of return by 0.1 percent is somewhat understated."

"*The question as to whether the filed rate change produces this amount is an issue in the proceeding but is not included in the issues to be determined in Phase I. The Commission has provided that interim rate adjustments may be made at the conclusion of Phase I, subject to accounting and refund, pending the outcome of its determination of the remaining issues. . . ."

ment for alleged "various costly mistakes" in regard to the methods and timing of financing employed and of the company's construction program. The Trial Staff also challenges the veracity of reasons given for service problems and undertakes to conjecture, among other things, that "one reason for the service difficulties may have been the *deliberate* policy formulated by the parent company, AT&T, to decrease the margin of spare operating capacity (T. 467)." (Emphasis in quote supplied.) Statistical data in the record do suffice, in the Examiner's opinion, at the least to raise *very serious questions* concerning the manner with which AT&T over the years has estimated its construction requirements. Nevertheless, it occurs to the Examiner that the problems involved in this cannot be suitably grappled with in a rate proceeding; that some sort of separate, perhaps wide-ranging investigation, of Bell System's practices in the procurement field, because of its relationship to construction estimates, may be called for by the necessarily limited data adduced on this subject matter in the instant proceeding; and that it may very well be that the ultimate remedy such an investigation might result in suggesting would require legislative authorization. To put the matter in briefest context, it occurs to the Examiner that if the worst had been established in the present proceeding—and the evidence and data in the record are not, in the Examiner's opinion, sufficient to prove the worst—if, indeed, one could say legitimately and without the slightest equivocation that Bell's construction estimates have been so consistently faulty and wide of the mark as to be a damning indictment of the company's management policies and practices over the years, how could such a situation be improved measurably and practicably by penalizing the company in regard to its allowed rate of return? Hitting Bell's management over the head in that manner could very well have the opposite of the desired effect, *i.e.*, of engendering chaos and poor service in the future, quite aside from the questions of legality that are necessarily raised by the pursuit of a punitive policy. If Bell cannot raise the capital it *actually* needs in order to provide quality service to the general public, who in the end will suffer the worst? Even the Trial Staff seems to recognize the futility of its own recommendation in this area; for, after marching all the way up the hill in order to propose to penalize AT&T, in establishing the allowable rate of return of the company, for "inefficiencies, mistakes, and ultra-conservatism", the Staff turns right around and marches down to the foot of the mountain by finally recommending the midpoint of the "range" it is proposing, due ostensibly to so-called "uncertainties" in economic conditions. The Staff, moreover, appears to recognize, by implication at least, that the current estimates of the company for 1971 and 1972 are likely to have continued the process of underestimating, for it does not seriously question the quantum of capital the Respondents say they will require from external sources. Clearly, from the standpoint of assuring continuing quality service to the general public, if there must be errors in estimating, it is better that construction and service requirements be overestimated than underestimated.

90. Illustrative of the problem described is the fact that Staff Exhibit 28 appears to show that the central office equipment operating

margin (*i.e.*, the difference between installed capacity and capacity actually in use) stood at 11.8 months system-wide in the year 1967 but dropped to 8.1 and 8.2 months at year end 1968 and 1969, respectively. The Trial Staff, pointing this out, then proceeds to observe that "Apparently representing a reversal of this policy [*i.e.*, an alleged 'deliberate' policy that caused the service difficulties of last year] and a return to pre-1966 standards, it [the margin] then rose to 12 months of margin by the end of 1970". Conceivably there could be a satisfactory explanation of such statistics as these, but none is found in the present record. On the other hand, as indicated above (para. 89, *supra*), the Trial Staff has indicated its suspicion that there may have been a "*deliberate*" policy of AT&T's management to decrease the margin of spare operating capacity, as if standing by itself and unexplained, this is a terrible indictment, citing page 467 of the transcript in support of its terminology. If one were to turn to the page preceding (p. 466), one finds Mr. deButts, AT&T's Vice Chairman, merely responding in the affirmative to a leading question on cross-examination, to wit, "Q. to account for this erosion of spares one of two things at least . . . took place, you can have lesser spare if the company as a matter of policy decides instead of having 'X' percentage spare they would have 'X' minus 'Y' and it would be a *deliberate decrease of spare as a matter of company policy. That is a possibility*, isn't it?" (Emphasis in quote supplied.) Continuing at page 467, Mr. deButts went on to explain that "We felt a few years ago . . . that with the control . . . and the information that we had on usage and the construction program activities, that we could operate without affecting the service with a smaller margin load in our central offices." "So", Mr. deButts continued, "we allowed . . . growth to eat into those margins." "Now", he concluded, "on top of that, in some localities, namely New York, we got an unexpected demand . . ." This would appear to have opened the door to a range of follow-up questions that were never asked, concerning the manner in which management seeks to protect itself against the unexpected and why it is that the record shows elsewhere a pattern of *consistent* underestimates as to construction requirements. The Examiner is convinced that the only objective and fair way to develop all the pertinent facts is through a separate investigation, with stated issues that put the company and its officials clearly on notice regarding the kinds and scope of the proof the Commission is seeking. Furthermore, separately from the present proceeding, it may very well be that consideration ought to be given to a tightening up of procedures and information filing requirements concerning construction estimates, in order to minimize future underestimating of requirements.

91. At paragraph 61 of its proposed findings, the Trial Staff points to the catgory labelled "service improvement" which, according to a Bell System exhibit, accounted for approximately 16.7% of its total construction budget in 1961, but only 8.4% (or about half) of the 1961 proportion, in 1968; and, it also appears that the 3-year period 1966–68, which preceded the serious service problems, was the only time when the "service improvement" category accounted for less than 10% of Bell System's total construction expenditures. By 1970, as the

Trial Staff observed, when the "massive" effort to improve service was under way, "service improvement" expenditures aggregated $870 million, or "more than twice the 1968 level and well above 10% of total construction". And, as the Trial Staff pointed out, its Exhibit 27 indicates that Bell had been "constantly and substantially in error in estimating its construction program". Thus, it appears therefrom that the estimate made in December of 1958 or in January of 1959, for the 1960 construction program was approximately 12% short of the actual 1960 program; that while the margins of error for the two-year prior estimates as compared with the actual programs subsequent to 1960 was less than 12% for several years, they were never below $100 million short in terms of dollar amounts; that, in particular, however, for the year 1965 the estimate made as of December 31, 1963 was $701 million, or more than 18% below the actual construction expenditures beginning 12 months afterward; and that the estimates for 1969 and 1970 were 25% below actual estimates. Similar instances of additional data that appear, presumptively at the least, to indicate slipshod planning by AT&T's management were cited in the Trial Staff's proposed findings, (*e.g.*, para. 63–65, inclusive). It is considered to be unnecessary to make this Initial Decision more prolix than it already is by detailing such examples, other than to state that they do exist and that, for the most part, they seem to be unexplained in the record. One of the most damaging of such instances, however, are statistics (Trial Staff's proposed findings, para. 63) which seem to show a lack of parallel in terms of either construction plans for the future or actual construction with year-to-year changes in demand. In particular, moreover, it would appear that the growth in construction expenses during 1969 and 1970 exceeded traffic growth by considerable sums and that it is made to indicate that what we might have here is a massive attempt to "catch up" for underbuilding during earlier periods. It is too important for the complete facts to be established on this matter, in the Examiner's opinion, and the Commission ought not to draw conclusions from inferences drawn on the basis of information that does not seem to be complete.

92. Without citing countervailing data or probative evidence, the Respondents responded to these serious contentions of management deficiency mainly by accusing the Trial Staff of looking at the problems from the "vantage point of hindsight" and of 'Monday morning quarterbacking'. There is an aura of plausibility in the countercharge, especially when one considers the fact that there is nothing in the present record, of which the Examiner has been made aware, to indicate that government regulators had paid serious attention to the problems of possible underbuilding and underestimating of construction requirements by Bell between 1958 and the initiation of this proceeding. But this cannot gainsay the pertinence and seriousness of the questions the Trial Staff of the Common Carrier Bureau of the FCC asks at paragraph 66 of its proposed findings, which can all be boiled down to the fundamental concern as to where the burden of errors in management judgment in the case of a regulated monopoly properly belongs, on the shoulders of the ratepaying public, or on the company's stockholders who are supposed to assume certain risks? In the Examiner's consid-

ered thinking there is no practical way to get at the basic issue that was raised by the Trial Staff in the course of fixing a fair rate of return for Bell System, even if it could be accomplished legally, that is, without risking the public itself to deteriorating of services provided to it by Bell. Starving the company of its fair rate of return, it would appear, could have the ultimate consequence of squeezing it of needed capital for the provision of service to the public. As a practical matter, moreover, we are not primarily interested—or we ought not to be—in convicting people herein for alleged sins of the past, either of omission or of commission. The Commission's chief concern in this case should be with the near future and with the initiation of a policy, or policies, that will provide an *incentive* to Bell System's management to improve service to the general public at a fair, but rock bottom, cost.

93. Paragraphs 28–48, inclusive of the Trial Staff's proposed findings present detailed statistical data on the growth of Bell System's construction programs from 1961 through 1968, from which the Staff deducted that between 1961 and 1965 Bell System's total revenues "were in step with the national economy, and that the construction programs increased more rapidly (about 1.5 times) than total revenues", in comparison with a "very different picture" for 1969 and 1970; on Bell System's increasing demands on the money markets, including Mr. Scanlon's explanations of the reasons therefor; and other related matters. To the extent of the factual data set forth in the paragraphs cited, the paragraphs are hereby adopted and incorporated by reference. At one point, paragraph 35, the Trial Staff concluded that vast increases in construction expenditures in 1969 and 1970 cannot be explained solely in terms of inflation or growth in traffic, which accounted apparently for only a small fraction of the increases. The Staff conjectures that the explanation is "in all likelihood necessitated by a policy adopted by respondents to decrease spare capacity (T. 467) and to underbuild during the 3-year period preceding 1969". As has been observed above, this can all be true; yet the Examiner cannot agree that it is a practical or wise policy, in fixing a fair rate of return for Bell System, to penalize the company at this time for what may have been a case of inefficient management during times gone by. It is useful, however, at the present juncture to refer to paragraph 10 of the Commission's Memorandum Opinion and Order of January 21, 1971, wherein the Commission asks whether the "sharp upswing in interstate operating expenses" for 1969 and 1970 are "to continue in the foreseeable future or whether adjustments should be made in the Company's operating results to reflect the non-recurring nature of these expenses if they are not expected to continue at such high level". As to this, it appears that the Trial Staff did not in the end, question Bell System's asserted need to raise some $4 billions of new capital in the years 1972 and 1973. Therefore, because the record, as it now stands (see paragraph 99, *infra*, however), justifies no contrary finding, the Commission's question must be responded to, tentatively, in the affirmative. *Cf.* Respondents' proposed findings, para. 109–111, which are adopted to the limited extent that Mr. Hough's testimony is therein described, and that data in the record, purporting

to indicate "increases in interstate maintenance expenses" for the years 1969–71, are therein duplicated.

94. With specific regard to the matter of "Quality of Service" (*Cf.* Respondents' Reply, p. 28), the Respondents in their Reply Brief, unfairly attack the Trial Staff for asking the Examiner to take official notice of "degraded service", in what they characterize as an "absence of evidence" on the subject. Because there is no dearth of statistics in the record to support the principal points of the Trial Staff's proposed findings on this matter, there is no need for the Examiner to utilize the "official notice" device. If the rhetoric is eliminated, paragraphs 50–54, inclusive, of the Trial Staff's proposed findings concerning the telephone company's claims of excellence for its telephone system, its claims as to fine service in the past, the "Table No. 3" summary of "Total Weakspots", and what the company has done in order to rectify service problems in New York, are accurate. Accordingly, minus the Staff's verbal characterizations and the sarcasm (which ought not to have been included), these paragraphs are adopted herein and incorporated by reference. In particular, the Examiner finds that paragraph 54, as an accurate summary of pertinent data indicating a degree of service deterioration in the Bell System,[15] is important enough to quote from in part:

> "The Bell System measures quality of service on the basis of some 19 service indicators including such items as unfilled orders, dial tone speed and customer trouble reports per 100 stations per month. When the criteria established by the Bell System itself are not met, the company calls the failure a weakspot . . . [The evidence demonstrates] that in several major cities there were a very high number of weakspots . . . Outstanding are New York, Miami, and Boston. Reference to Omaha and New York, which follow each other, [in Table 3] shows that, with one exception in 1967, weakspots in Omaha averaged 4 and this is the figure for both 1969 and 1970. In New York weakspots more than quadrupled between 1966 and 1970. [Table 3] also shows that service difficulties peaked in 1969 when the Bell System criteria were exceeded in 361 instances or almost 2½ times the 155 instances in 1967. Even though 1970 shows improvement over 1969, it still has almost twice as many weakspots as in 1967 . . ."

95. During the hearing Mr. Hough, one of Respondents' witnesses on the quality of service matter, tried to attribute service problems primarily to unforeseen traffic growth. But the statistics indicate that while, during 1966, interstate message traffic grew by some 13.5% over 1965, in the year 1969, the year cited for unexpected growth, traffic increased only by 13.2% over 1968. As the Trial Staff suggests (Trial Staff proposed findings, para. 56), if the company handled a growth rate of 13.5% successfully and without service impairment it ought to have been able to handle a subsequent 13.2% growth rate similarly. There is no explanation in the record for this apparent anomaly other than a suggestion that Mr. Hough was caught by surpise. There are also statistics that show a net gain in total telephone by years, both in absolute members and in percentages; that in 1969 there had been a net gain of 5.37% in comparison with 5.35% during 1966;

---

[15] A further specific indication of service deterioration would be the record of service complaints. It appears that in New York State during 1966 the State Public Service Commission received 1,707 complaints while by 1970 the number had leapt to 28,666, or more than 15-fold.

that Respondents had been able to handle much greater percentage gains between 1946 and 1951, ranging from 5.73% to 14.54%, without apparent service problems; and that during the 1955–59 period, with the exception of 1958, there had also been higher percentage gains, ranging from 5.71% to 6.98%, apparently without the service problems encountered in 1969 and 1970.

96. There is also the explanation by Mr. deButts, Respondents' Vice Chairman of the Board, that the service problems encountered in New York were due partly to a change in the law which permitted welfare recipients to have telephones. But it developed later on in the record that this change had occurred during 1966, at least two years before service problems in New York started to become acute, Mr. deButts having asserted that it takes 18 months to 2 years to install additional central office equipment in order to handle increased demand (T. 463). Also, the problems encountered in Boston were attributed by Mr. deButts entirely to a strike that delayed the installation of additional central office equipment; no surge in demand having been claimed or asserted. But the record indicates that the strike took place during the spring and summer of 1968 and lasted only 18 days generally. And it was asserted, finally, that the service problems in Boston had for the most part been resolved, in the face of the fact that the record also demonstrates that during 1970 Boston had 33 so-called weakspots, almost twice those of 1968, the year of the strike, and that this was only a slight improvement over the performance of 1969.

97. As indicated above, the Trial Staff has sought to attribute the 1969–70 Bell System service problems to other causes, *e.g.*, the so-called "deliberate" policy to decrease the margin of spare operating capacity, to alleged under-budgeting of construction programs, and to claimed underbuilding of needed facilities, all of which had led inevitably to a massive effort to catch up.

98. As the Respondents have noted in their Reply Brief, the evidence on service quality was not entirely unfavorable to them. Thus, the evidence as a whole does not justify any generalized adverse characterization about the quality of Bell's present interstate service. The evidence does seem to concentrate primarily on service problems in New York (although the problems, *supra*, appear to have been rather acute in Boston and elsewhere, too); and it does appear that a real effort has been mounted to cure these problems. It also does seem that the company's definition of a "weakspot", if a dial tone delay of over three seconds occurs on more than 2.6% of the call attempts during the busy hour, or about one out of 40 calls during the busy hour, is quite stringent.

99. Beginning at paragraph 258 of its proposed findings, the Trial Staff submitted, under the subject heading of "Revenue Requirements", some 20 paragraphs of recommended findings that accept the year 1971 as the "test year" to provide the base from which interim rate adjustments should be determined, but at the same time the Trial Staff seeks to annualize the four months February–May 1971 actual operating experience of Bell System, in lieu of the "view" of the

full year 1971 upon which Bell's rate filing was based.[16] (*Cf.* paragraph 88, *supra.*) Apart from the obvious unfairness to the Bell System Respondents, who have not, as far as the Examiner has been made aware, entered into any on-or-off-the-record stipulations to authorize such a process of annualization and who have objected, *inter alia*, on the substantive ground that "no increases in wages are reflected in the four months used by the Trial Staff as the base for constructing its [new] test period" (Respondents' Reply Brief, p. 37), this method of procedure shows an astounding disregard, and disrespect, for the needs and sensibilities of the Presiding Examiner, who is being called upon here to examine, for the first time, a substantial quantity of intricate accounting data (and projected analysis thereof), under an explicit directive by the Commission to expedite his Initial Decision, with no opportunity to question the staff's analysis of such data on the record. Moreover, by the time the Commission itself will be in a position to render its final decision on the Rate of Return issue herein (even before, when it will be in a position to adjust the rates on an interim basis), it will have before it the actual revenue and expense data of Bell System for the year 1971. There will then be no need to "annualize", because the Examiner would fully expect AT&T to accept the substitution of the *actual* data for its 1971 "View", subject to whatever adjustment may be deemed appropriate at that time. On balance, therefore, for present purposes, the Examiner accepts at face value the Respondents' assertion, at page 37 of their Reply Brief, that "In contrast, Bell's view for 1971 recognized the fact that the wage level was to be renegotiated in mid-1971 and included an allowance for increased wages based upon previous experience". Indeed, according to the record, an "8 percent factor for increase in wages" was included (T. 2787), when, as a matter of fact, the public announcement (officially noted) of the wage package actually negotiated during July indicated more than a 33% wage increase over the next three years had been agreed to.

CONCLUSIONS AND SUMMARY

100. As one of the parties to this proceeding cogently remarked—[17]

> The ease of enunciation of these guidelines [*i.e.*, by the U.S. Supreme Court in *Bluefield Water Works & Improvement Co.* v. *West Virginia Public Service Commission*, 262 U.S. 679; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591; and *Permian Basin Area Rate Cases*, 390 U.S. 747, 808] is not matched, unfortunately, by ease of application. Perhaps no area of law . . . has given birth to as great a volume of legal, economic, financial, mathematical, and econometric prose as has the proper application of the Court's rate of return guidelines. In large part responsible for this volume is the simple fact that in

[16] Actually, paragraphs 258–266, pages 185–190, inclusive, are introductory. In paragraph 266, the Trial Staff states its "position" (which, in the Examiner's opinion, the record does not justify unequivocally) that "if in fact the service problems are being resolved, [by Respondents] then expenses should return to more normal growth rates and probably for a time to below normal rates of increase to compensate for the over-inflated growth in the last ten years. The best proof of what 1971 brings forth in the 1971 experience. . . ." The Trial Staff then asks the Examiner and the Commission after him to take official notice of the Respondents' own monthly reports of operating results for this year, "as well as all subsequent reports available prior to the issuance of the Initial and Final Decisions herein." The attempted annualization then ensues.

[17] Brief of United States Independent Telephone Association (USITA), pp. 2 and 3.

the final analysis, determination of a rate of return is and must be an exercise in judgment. . . .

Indeed, the Supreme Court has explicitly recognized in the *Hope* case, *supra*, the fact that a commission's rate-making function involves the making of "pragmatic adjustments". 320 U.S. at 602. Interpreting the statutory standard of "just and reasonable" under the Natural Gas Act of 1938, the Court declared that "it is the result reached not the method employed which is controlling"; that "It is not theory but the impact of the rate order which counts"; that "If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end"; and, finally, that "The fact that the method employed to reach that result may contain infirmities is not then important". *Id.*

101. The Examiner has obtained guidance for his conclusions and recommendations herein primarily from the Commission's language in its published opinions (*e.g.*, its decision in Docket No. 16258, 2 FCC 2d 30) and from the guidelines laid down by the Supreme Court in the *Hope* case; and not from any esoteric theories concerning the function of regulation as some sort of a substitute, which clearly it is not and never can be, for the forces of competition. Indeed, the Supreme Court has succintly proclaimed the proper function of rate regulation, where it described the rate-making process as involving "a balancing of the investor and the consumer interests", and where it very carefully established as basic principle that "the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks"; and that the return "should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital". Elsewhere the Court elaborated where it declared that "Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called 'fair value' rate base". See *Federal Power Commission* v. *Hope Natural Gas Co.*, *supra*, 320 U.S. at p. 603 and 605, respectively.

102. Predicated on the preceding findings and intermediate conclusions, and upon his review of the record, the Examiner concludes that the Bell System Respondents have not persuasively demonstrated that the 9.5% overall rate of return they have requested is fair and reasonable; that if the 9.5% figure is excessive in one direction the Trial Staff's recommendation of 8.0% is an exaggeration in the opposite direction which, if adopted by the Commission, will not fairly and reasonably, in the Examiner's opinion, compensate investors in AT&T under current inflationary economic conditions; and that, predicated on an embedded debt cost for 1971 of at least 6.0%, and an equity return ranging between 10 and 10½% (which the Examiner believes is overwhemlingly supported as fair by the creditable, probative evidence), with 10.3% being used for computation purposes, and upon an assumed debt ratio of 48%, an overall return of 8.25% (8.236% with .014% added to round out and for contingencies) is fair and

reasonable, under present economic conditions. Furthermore, the Examiner specifically adopts Professor Myers' concept of the "conscious" use of "regulatory lag" and urges the Commission to give this idea its most earnest consideration as a pragmatic method of providing an incentive to the carrier and its management to improve in efficiency. The Examiner believes the record, for this purpose, warrants the establishment of a "range" of an overall fair rate of return of between 7.9% and 8.8%, which allows for sufficient flexibility to take account of possible near future fluctuation in the economy while at the same time providing an incentive to AT&T's management to improve its service effectiveness and thereby to develop an actual overall rate of return as much as .55% above the proposed 8.25% allowed herein, without having to undergo the tribulations and costs of a new hearing.[18]

103. In arriving at the conclusions set forth in the preceding paragraph, the Hearing Examiner relied primarily upon these clearly established facts of record, to wit: the drastic change in the nation's economy since 1966 when the Commission authorized a 7.0% to 7.50% rate of return for Bell, precipitated by events which have caused a veritable explosion of inflationary forces that are not yet brought under satisfactory control; the significant increase of 3% to 3½% in the cost of money since 1966 that has been engendered and exacerbated by the rapidity of the rate of inflation in the economy; the fact that through all the economic turmoil, Bell System is a "Rock of Gibralter" insofar as business and financial risks are concerned and that a margin somewhat in excess of 2 percentage points above current debt costs seems to be fair and reasonable compensation, under the circumstances, to Bell equity holders for the minimal risk they assume; that currently (early August of 1971), AAA rated, long-term utility bonds (including Indiana Bell) are being issued with yields in the range of 8.1% to 8.20%; that for the entire year 1971 an average debt cost to Bell System estimated in the record at 7.8% appears to be reasonable, although perhaps on the low side, considering the sluggish, but seemingly continuous upward trend of long-term interest rates; that embedded debt cost to Bell System by the end of 1971 should be very close to 6.0% and, if anything, according to the Trial Staff's own witness, Mr. Kosh, somewhat above that figure (6.05% or 6.06%); and that Bell System, as the largest U.S. corporation, at least in terms of the number of its stockholders, and as a national public utility, has a grave responsibility, that goes with its size and vast wealth, to keep its operating costs to a minimum at all times, but especially at a time when the Government is struggling to keep inflationary forces in check which, if allowed free rein, could ruin the American economy and with it the American nation as this generation and our fathers knew it.

104. The Examiner has also taken account of the fact that the evidence indicates clearly (considering its dividend pay-out record and

[18] Dr. Myers' approach, other than the manner in which it was articulated, is certainly not novel. Indeed, one might find it useful to examine the concurring opinion of former Commissioner Lee Loevinger to the Interim Decision in the Docket No. 16258 proceeding, 9 F.C.C. 2d at page 120, wherein mention is made of a "third alternative" of modes of regulation, under which the Commission would "permit the rate of return to increase within a relatively wide range so long as the actual rates charged users decreased or did not increase and the service continued to improve."

record of capital gains over a long period of years, to say nothing of its A+ Standard & Poor's stock rating and its past and present debt ratings of "AA" and "AAA" by Moody's, and the fact that even in 1970, a very poor year for many businesses, Bell's earnings performance was, relatively speaking, not bad) that for investors whose primary investment objective it is to preserve their capital over the long pull while drawing down substantial and increasing earnings in the form of dividends, with some inflation protection built in, Bell System equity continues to be a prime investment opportunity. Indeed, the record demonstrates beyond question that AT&T stock is still highly regarded by sophisticated institutional investors and individuals alike. Consequently, the Examiner is convinced that there is no reason whatever, even under today's straitened economics, for regulators or anyone else to be fearful of Bell's continuing capacity to attract capital at reasonable cost.

105. If it is desirable that AT&T stock sell on the stock market at well above its book value, it must yet be stressed that, under present laws and regulations, probably the only way the Administration in Washington can bring this happy state of affairs about is to be successful in controlling the rate of inflation in the economy. Speaking in general terms, the market place for stocks and bonds is free and if investors at any particular point in time (like the present) are led to believe that they can obtain more instantaneous protection from the ravages of inflation by investing in Industrials rather than in Utilities, it follows that as a group the prices of the latter in the market place will be depressed.[19] There is in brief, no magic way and, in fact, no responsibility in law or public morals, for the Government to guarantee any particular price in the market place for the securities of a regulated common carrier. But the Examiner yet believes that if government regulators should adopt punitive policies, that would penalize the company today for alleged past management errors, instead of seeking *constructively* to correct past deficiencies in operation, while looking ahead to a better and more effective future operation, it stands to reason that investment psychology will receive a jolt that could seriously impede the capacity of AT&T to raise the capital it needs in order to provide the services it offers to the general public. Thus, the Hearing Examiner takes this opportunity to urge the Commission to reject unequivocally the heavy-handed, and probably self-defeating approach of the Trial Staff which would impose a penalty for alleged past management mistakes or failures at AT&T and then cancel out the penalty, ostensibly because of an admitted fear of the economic consequences.

---

[19] It is to be inferred that with the inflation-induced high interest rate level continuing, many investors will continue to find fixed-obligation long-term debentures more to their liking even than the stocks of companies whose earnings are protected by government regulation. Or, if they prefer to trade on risks, some investors may find the highly leveraged equities of some Industrials more to their liking than slow moving Utilities. The point to be made, however, is that under present conditions there is very little basis for finding or assuming any particular correlation between the rates of return authorized to utilities by government regulators and the market prices of their stock. In the Examiner's opinion, this climate cannot be expected to change significantly unless the inflationary expectations of people are changed or decisively reined in and renewed confidence in the American economy is affirmed by the public.

106. In regard to the evidence that has been adduced concerning the claim of poor budgeting of construction and underbuilding by Bell's management, it has occurred to the Examiner that here is an area wherein AT&T's management ought to cooperate with government, and *vice versa*, to devise specific and concrete criterea and solutions to budget problems that will conduce to more effective planning for the future. As has been suggested above, the Examiner believes this might be the subject of an investigation of all aspects, including Bell's procurement methods, independent of the present rate proceeding, and that it appears to the Examiner that the data in the present record on this important subject, though adverse to Bell System's management, is not a disclosure of the entire picture. It has also occurred to the Examiner that if Bell's management is to be criticized by government regulators for mismanagement in the years gone by, government regulators, at all levels, themselves ought to shoulder some of the blame for waiting until 1971 to do something about the situation. The Examiner suggests, however, that statesmanship calls for concentrated efforts to improve *present* and *future performance* and that the Commission should do all it can to promote such objectives, instead of seeking to find scapegoats by resurrecting the dead hand of the past.

107. In reaching his conclusion of 8.25% as a fair and reasonable overall rate of return for Bell System, the Examiner believes he should also note for the record that he has given weight to the recommendations of the City of Chicago (8.2%) and the State of New Jersey (8.0% to 8.5%), two intervenors which, like the Federal Government, are supposed to be concerned with the public interest, with no other axes to grind, and that he was strongly persuaded by the Commission's own witnesses,[20] Dr. Myers and Mr. Kosh, to find a reasonable mean between Mr. Kosh's 7.9% and Dr. Myers' 8.5%, and a range that takes account of current economic realities. The Examiner was also persuaded by a myriad of other factors which he considered to be of a somewhat lesser importance than those which have been specifically mentioned hereinabove, such as the mathematic formulae that have been used which, if anything, in his opinion, confirm the conclusion as to an overall rate of return of 8.25%. The Examiner also notes for the record that he has denied the pleas of those intervenors, *e.g.*, The Secretary of Defense and the Executive Agencies of the United States Government, that seemingly would refuse *any* relief to AT&T on the ground that the Company failed "completely" to carry its burden of proof. For to have done their bidding would have been to ignore the evidence in the record that has been introduced by others than AT&T, on the assumption (which the Examiner does not accept) that AT&T's own evidence was entirely unpersuasive. The burden of proof doctrine is a useful procedural tool, to the extent that it identifies the party responsible for adducing evidence and the party or parties upon whom the risks of non-persuasion lie; but it may not be utilized for the purpose of thwarting justice when the evidence as a whole (irrespective of

[20] In *Market St. Ry. Co.* v. *Railroad Commission*, 324 U.S. 548 (1945), the Supreme Court held that the judgments of experts would not be binding on an administrative agency. "Their testimony", the Court declared, "would be in the nature of argument or opinion, and the weight to be given it would depend upon the Commission's estimate of the reasonableness of their conclusions and the force of their reasoning." 324 U.S. at 560.

the identity of the party adducing it) suffices for a substantive evaluation and justifies a lesser relief than the relief formally claimed by the party with the burden. The "public interest", remains the touchstone for decision-making in administrative procedings. For a learned discussion on the subject of the meanings of 'burden of proof', see Wigmore, "Evidence", 1940 Ed., Vol. 9, Sections 2483–2489, inclusive. And on 'Sufficiency of Evidence', *Id.*, Sections 2494, *et seq.*

108. The Examiner has endeavored to consider the points of view of *all* the other parties to this proceeding, in addition to the views of the Respondents, the Trial Staff, and the Secretary of Defense who happened to have participated most fully. It appears, in particular, that the procedural objections of Grassroots Action, Inc. and the Telephone Users Association, Inc. have been "misdirected" (Respondents' Reply Brief, pp. 38 and 39). For, if the Commission had not ordered an "expedited" hearing on the interim rates filed by AT&T at the Commission's request, it is likely, as the law provides, that consumers would have begun paying the *full rates* initially filed by AT&T as early as April 19, 1971, since the alternative would appear to have been a suspension of Bell's Initial Rate filing for the three month maximum prescribed by statute (Communications Act, Sec. 204). Under the procedure adopted in this proceeding, consumers are paying the *lower* level of interim rates until further Commission action, presumably within the "time frame of six to nine months (barring extraordinary developments)". 27 FCC 2d at 154. Moreover, of course, while the consumers are protected by the Commission's accounting order, the carrier has no way of recovering from consumers increased rates that ultimately may be found to be necessary. The complaints of these intervenors regarding the conduct of the hearing similarly were "misdirected"—to the Examiner rather than to the Commission, whose directive the Examiner has been endeavoring, earnestly, to comply with. Apart from the fact that it is difficult to visualize how the general consuming public and these parties could be expected to have benefited by the procedural delays they apparently were seeking, and the fact that the Trial Staff, as far as this Examiner was able to observe, performed a prodigious service in helping to develop every conceivable point, favorable and unfavorable, to the public interest (almost with a zeal that one would ordinarily expect to see confined to advocates of a political 'Cause'), the complaints are predicated upon fragments of the record which were wrenched from context. See transcript, pp. 4453–4466, inclusive, and footnote 40 to page 39 of the Respondents' Reply Brief. Although the record on these matters certainly will have to speak for itself, the fact remains that the Hearing Examiner could not possibly have subjected the hearings to the interruptions sought by Mr. Curtis, in particular, without forfeiting all pretense of trying to comply with the '6 to 9 month' limit ordained by the Commission for holding the hearing on Phase I of this proceeding, for the preparation and submission of proposed findings and briefs and reply briefs, and the preparation of this Initial Decision. It is a fact, however, that there are no adequate procedures in law or regulation, applicable hereto, for questioning the identity, legitimacy and sincerity of such litigants as Grassroots and Telephone Users Asso-

ciation and for evaluating their claims of financial incapacity or hardship, and for providing them, assuming they were legally entitled thereto, with special rights of representation not provided to any other party. Nonetheless, if the Grassroots representative, who has used the occasion of the proposed findings stage to maintain an objection he raised during the hearing, had but read the transcripts of the hearing in the Commission's public reference room from day to day, instead of waiting until the 29th day (and virtually the 11th hour) to make his appearance for the purpose solely of supporting the presentation of a witness offered by another party, he ought to have understood the Examiner's ruling excluding that evidence as adding nothing to the record but naked, unsupported, conclusions (T. 4458–63).[21]

109. Microwave Communications, Inc. (MCI) maintained in its Reply to Proposed Findings, among other things, that "the Examiner should do nothing more than determine the rate of return which the record shows AT&T should be authorized to earn, stated as a simple percentage figure, and then leave it to the Commission to implement that percentage rate of return—or any modification of the Examiner's result it may find reasonable—only *after* it has had the benefit of the record in Docket No. 18128 with respect to rate structure and the justification, if there be any, for imposing all the increases on MTS alone". It is certainly arguable, the Examiner believes, particularly from the ruling of the Commission in its Memorandum Opinion and Order, adopted June 24, 1971 (FCC 71–667), that the Commission does not wish to have the Examiner in Phase I of this proceeding to do more than to determine the "fair rate of return" to Bell System.[22] Indeed, the Commission has ruled explicitly therein that "there is no need for the Hearing Examiner or the Commission" in Phase I, "to deal with any question of rate relationships . . ." Certainly, it would at least be inappropriate for the Examiner in the light of so forthright a directive from the Commission, to purport to do anything whatever relating to the problem of rate relationships in Phase I. Accordingly, no findings or conclusions predicated on the basis of the fragments of evidence adduced on this subject during Phase I are formulated herein. True, there is now pending an effort by MCI, supported by the Trial Staff, to have the Commission reconsider its June ruling. But the Examiner considers that ruling, as it stands, to be the "law of the case" until the Commission changes it; and that there is an overriding interest in the release of an early Initial Decision in Phase I, irrespective of the pendency of the requests for reconsideration.[23]

---

[21] If the Grassroots representative takes umbrage at the Examiner's terse treatment of his sudden and unexpected interest in the case, the Examiner herewith formally apologizes.

[22] The Ordering clause of the Commission's Memorandum Opinion and Order of January 21, 1971, *supra*, p. 12, appears to have vested the Examiner, at the very outset, with a range of discretion as to what he may permit to be aired during Phase I beyond the "rate of return issue". For it prescribes that he "shall conduct a hearing with the objective of issuing, if practicable and fully consistent with the requirements for a full and fair hearing, an Initial Decision no later than six months following publication hereof . . . on the rate of return issue, *and on such other issues as the foregoing schedule will permit.*" (Emphasis supplied in quote.)

[23] Under Rule 1.106(a) ". . . Petitions requesting reconsideration of an interlocutory ruling made by the Commission . . . will not be entertained". Unless the Commission may decide, purely as a matter of discretion, to depart from this rule, it is reasonable for the Examiner to predict and to assume that in due course the petition for reconsideration will be *dismissed*.

110. It would seem that somewhat as an afterthought the Trial Staff, beginning at page 165, paragraph 242, of its proposed findings, has brought up the matter of the relationship between AT&T and Western Electric. For the Staff takes note therein of the fact that "As shown by the record herein, the earnings which support AT&T and constitute its overall rate of return come from two lines of business—communications service and manufacturing"; that AT&T owns all of Western Electric whose investment return during 1970 was 11.59%; that the Respondents consider that an appropriate level for the equity of Western Electric would be at least 12½%; that the Trial Staff was "accepting the earnings of Western Electric for Phase I of this proceeding"; *and that the Respondents "concede" the propriety of taking account in Phase I "the actual return received by AT&T from its investment in Western Electric in determining how much in the way of earnings must be contributed by communications to meet the total earnings requirements of AT&T . . .*" (Emphasis in quote supplied.) Thus, the Trial Staff, in the following paragraph urges that the "rate of return appropriate for use in determining the revenue requirements of interstate communications, is 7.8% which we emphasize does not reduce in any way the fair rate of return of 8.00% [the Trial Staff recommends] for AT&T". The calculation by which the Trial Staff reaches the 7.8% figure is depicted as Table No. 12 of its proposed findings. The "rub" in all this is that in their Reply Brief, page 24, the Respondents seem to deny the concession on the matter the Trial Staff evidently believed it had, dispute the validity of the 1970 earnings figures for Western Electric being used in this manner, and raise the point that the problems involved in the matter of Western Electric's prices and earnings have been assigned by the Commission to the Phase II issues in this proceeding. It also appears that, whereas the citations to the record given by the Trial Staff in support of its position on this matter do indeed indicate that the subject was developed to some extent, without objection by opposing counsel, yet the evidence seems to be fragmented and incomplete, insofar as the disclosure of facts and data that are necessary for a proper and accurate adjustment of the Bell System overall fair rate of return is concerned to account for Western Electric's earnings. Consequently, while the Examiner must agree, in principle, that "In simplest terms, if a utility with two lines of business has a total earnings requirement of $100 and earnings of $5 from one line of business, then the other line of business has to be $95", he is quite unable (predicated on the present state of the record) to also agree that the problem as presented lends itself to the facile kind of solution recommended by the Trial Staff. Consequently, as much as the Examiner desires to close up as many 'loose ends' as possible at the present time, he sees no feasible alternative to deferring an appropriate adjustment of AT&T's newly authorized rate of return, to take account of Western Electric's earnings, until such time as all the pertinent facts are brought into the record.

111. A final issue remains for consideration. Is it appropirate for the Examiner, in the light of the Commission's own language, the contradictory or seemingly conflicting statements in the briefs of some of the parties, and the uncertainty presently prevailing with regard to facts and data for 1971, that will become available in a definitive way

109-045—73——5

early next year, for the Examiner to attempt to frame an Ordering Clause herein that would look towards the implementation, on a tentative basis, of what he has concluded is a fair overall rate of return for Bell? If he were to undertake to perform this task at the present time the Examiner would have to accept the Bell System's "view" and the Respondents' calculations predicated thereon, set forth in paragraph 107 of their proposed findings, (para. 88, *supra*).[24] It is pointed out therein, *inter alia*, that the currently effective $250 million rate increase essentially has the effect of 0.95% on interstate rate of return, or $250 million divided by $26.2 million per 0.1% change, on the basis of which the 7.2% rate of return the company had been earning in the 1971 "view" has been increased to 8.15%. In order to improve the overall return the additional .10% recommended by the Examiner, the tariffs in effect would have to be modified to provide an additional increase of $26.2 million, and, of course, there would have to be future adjustments to account for the Western Electric problem and the actual operating results—revenues and expenditures—for 1971, to say nothing about adjustments that may ultimately be required as a consequence of the Commission's findings in the Docket 18128 proceeding. It is to be emphasized, moreover, that if the practicalities are to be considered in facing up to the procedural problem, the Commission's rules, which are the prescriptions of "due process" for the parties, allow a total of approximately 6 weeks from the date of release of this Initial Decision for the filing of exceptions and replies to the exceptions, which period of time may, of course have to be extended at the request of one or more of the parties, and for oral argument before the Commission *en banc*. Therefore, no matter how much the Commission may desire to "expedite" the proceeding further, it is unlikely that it will be in a position to render its final decision on Phase I before early 1972, when the 1971 data will become available, so that it would no longer be necessary to depend almost entirely on predictions. Because of these inevitabilities, primarily, and the Commission's language in the Ordering Clause of its January 21, 1971 Memorandum Opinion and Order (*supra*, footnote 6) which seems to vest a degree of discretion in the Presiding Officer as to such matters, the Examiner has determined to limit the Ordering Clause hereof to the prescription of a fair overall rate of return for Bell System, leaving the procedural complexities involved in prescribing intermediate rate relief for Bell System, or possible adjustments for the ratepayers, entirely to the wisdom of the Commission in the light of the developments, present and future.[25]

---

[24] In all justice, no party ought to be permitted "to have its cake and to eat it too". Thus, it would certainly appear that once the Bell System Respondents object, as they have, to an attempted annualization of revenues and expenses based on only 4 months of operation, they ought not to complain if the Examiner declines, on the basis of their "view", to prescribe interim relief until data for the entire year 1971 becomes available in a few more months. Indeed, compare *New York Telephone Co.* v. *New York P.S.C.*, —— N.Y. ——, 1971 (not yet officially reported), cited at page 4 of the Trial Staff's Reply, where it seems that New York Telephone Co. objected to a New York Public Service Commission decision that was not predicated on actual operating results experienced since the record was closed. Unlike the Trial Staff, however, which argues that the Respondents' predictions were *proven* to be substantially incorrect on the basis of 4 months operations that do not take account of recent wage increases, the Examiner believes it will conduce better to justice to wait the few months so that we may have the benefit of actual results for the full year. Furthermore, the effort of the Trial Staff to have the Examiner and the Commission take official notice of the data for four months and to accept the Staff's

ADDENDUM

112. In the light of the announcement by the President of the United States, on August 15, 1971, of a variety of steps the Government is now taking in order to dampen down inflation and inflationary expectations (including a 90-day freeze on prices and wages), it is suggested that the management of AT&T, the largest American corporation, may consider it to be appropriate to take a public position on what it is prepared to do in furtherance of the fight against inflation. Considering the state of the record in this case, few would be shocked if, at this juncture of history, the company were, as a bare minimum, to renounce its 9.5 percent requested overall rate of return and to avow its "commitment" to improve upon budgetary procedures and to minimize future construction costs. Other steps might be taken, in a similar vein, that would project a more statesmanlike image than perhaps the company can be said to have enjoyed in the recent past.[26]

Accordingly, predicated upon the foregoing findings and conclusions and the entire record of Phase I of this proceeding, and subject to such adjustments as future circumstances may require, IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules and Regulations, a level or range of interstate earnings between 7.9% and 8.8% for the American Telephone and Telegraph Company is hereby established as fair and reasonable, as to which, it being understood, current economic conditions justify a rate of return of 8.25% within the said range.

FEDERAL COMMUNICATIONS COMMISSION.
DAVID I. KRAUSHAAR, *Hearing Examiner.*

---

analysis, without affording the parties an opportunity to raise questions thereon during the hearing, would appear to be arbitrary.

[25] In their proposed findings and conclusions, pp. 76, 77, the Respondents have recommended the adoption of an Order that would authorize them to file revised tariff schedules to reflect the interim rate adjustment they believe they are entitled to. At the bottom of page 37 and the top of page 38 of their Reply Brief, however, they seem to have altered their position on this matter. For they say therein that "there is no occasion for the Examiner to be concerned about subsequent developments that may affect the going level of interstate earnings", and that the Examiner "may safely issue his Initial Decision on the basis of the record without endeavoring to calculate new test year results based upon a few monthly reports reflecting prior wage levels". And they point out that the Commission does not expect AT&T to propose an appropriate rate adjustment for its interstate services until after the Commission issues a Final Decision on the "crucial question of fair rate of return".

[26] As the Examiner understands it, it is premature to consider the effects, if any, of the announced "freeze" on wages and prices upon any rate adjustments that may have to be made in this proceeding. Presumptively at least, the "freeze" the President has decreed may be vacated in only 90 days (by November 12). There is no basis whatever for predicting now the impact, if any, of the steps that have just been taken by the President, in August, upon the crucial economic issues in this proceeding. Be this as it may, there certainly is nothing either in law or in equity, that the Examiner is aware of, to prevent AT&T from voluntarily agreeing to hold its rates at a particular reasonable level and from publicly announcing its stand. There also appears to be a possibility, assuming the enactment of the requested authorization for same, that AT&T will be in a position to reap a substantial tax windfall from the President's proposed 10% tax credit for investing in American-made machinery and equipment. AT&T's management may, if it so desires, determine *in advance* to level with this Commission and the general public as to the policy it proposes to pursue that would benefit its ratepaying customers if such a windfall should become available to it.

F.C.C. 73-630

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO., LONG LINES DEPARTMENT Revisions of Tariff F.C.C. No. 260 Private Line Services, Series 5000 (TELPAK)	Docket No. 18128
AMERICAN TELEPHONE & TELEGRAPH CO. Revision of American Telephone & Telegraph Co., Tariff F.C.C. No. 260 Series 6000 and 7000 Channels (Program Transmission Services)	Docket No. 18684

ORDER

(Adopted June 13, 1973; Released June 19, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE ABSENT.

1. In accordance with our order FCC 73-502, released May 15, 1973, oral argument WILL BE HELD on the questions set forth in said order relating to the rate structure of Program Transmission Services before the Commission *en banc* on June 26, 1973, commencing at 9:30 a.m.

2. Having considered the written notices of intention to appear and participate in oral argument, IT IS ORDERED:

(a) that the parties here designated ARE AUTHORIZED to present oral argument in the following order for the times designated:

	Minutes
Bell System Respondents	60
American Broadcasting, Cos., Inc., Columbia Broadcasting System, Inc., and National Broadcasting Co., Inc	45
Hughes Sports Network, Inc	60
Commissioner of Baseball	20
State Mutual Broadcasting Corp	20
Association of Independent Television Stations	20
National Hockey League	15
TVS, Inc	5
Detroit Tigers Television Network	5
UPITN Corp	20
Corporation for Public Broadcasting and Public Broadcasting Service	5
European Broadcasting Union	10

(b) That the Bell System Respondents MAY RESERVE part of their time for rebuttal thus closing the argument.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-654

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMERICAN TELEPHONE & TELEGRAPH CO.	File No. S-C-L-46
HAWAIIAN TELEPHONE CO.	File No. S-C-L-46-4
ITT WORLD COMMUNICATIONS, INC.	File No. S-C-L-46-1
RCA GLOBAL COMMUNICATIONS, INC.	File No. S-C-L-46-2
WESTERN UNION INTERNATIONAL, INC.	File No. S-C-L-46-3
Application for a License To Land and Operate a Submarine Cable Between the State of Hawaii and the Territory of Guam, Said Cable To Extend From the State of Hawaii, via Guam, to the Island of Okinawa in Japan	

CABLE LANDING LICENSE

(Adopted June 14, 1973; Released June 15, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONER H. REX LEE ABSENT.

The Commission having under consideration applications, File Nos. S-C-L-46, S-C-L-46-4, S-C-L-46-1, S-C-L-46-2, S-C-L-46-3, filed by the American Telephone and Telegraph Company, the Hawaiian Telephone Company, ITT World Communications Inc., RCA Global Communications, Inc. and Western Union International, Inc., respectively, requesting a license to land and operate jointly a submarine cable between the State of Hawaii and the Territory of Guam, such cable to extend from Hawaii, via Guam, to the Island of Okinawa, Japan, HEREBY GRANTS AND ISSUES, under the provisions of an Act entitled, "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S. Code, Sections 34-39) and Executive Order 10530, dated May 10, 1954 (delegating to the Federal Communications Commission certain presidential functions relating to submarine cable landing licenses) to the American Telephone and Telegraph Co., a corporation organized and existing under the laws of the State of New York, the Hawaiian Telephone Co., a corporation organized and existing under the laws of the State of Hawaii, and ITT World Communications Inc., RCA Global Communications, Inc., Western Union International, Inc., corporations organized and existing under the laws of the State of Delaware, hereinafter known as Licensees, a license to land and operate a submarine cable as follows:

A high capacity single submarine cable with rigid two-way repeaters, and armoring where necessary, of a type designated SF, providing for telephone, telegraph and data communications, between the State of Hawaii and the Territory of Guam, extending beyond Guam to the Island of Okinawa, Japan (Transpac II).

subject to the provisions of the above-cited Act entitled, "An Act relating to the landing and operation of submarine cables in the United States", the Communications Act of 1934, as amended (47 U.S. Code, Sections 151–609), subsequent applicable Acts and all rules and regulations heretofore or hereafter made by the Federal Communications Commission pursuant to authority vested in it; subject to any treaties or conventions relating to communications to which the United States is now or may hereafter become a party; subject to any action by the Commission or the Congress of the United States rescinding, changing, modifying, or amending any rights accruing to any person hereunder; and subject to the following conditions:

(1) That the location of the cable within the territorial waters of the United States, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army and the cable shall be moved or shifted by the Licensees at their expense upon the request of the Secretary of the Army whenever he considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) That the Licensees shall at all times comply with any requirements of appropriate United States authorities regarding the location and concealment of the cable buildings and apparatus with a view to safeguarding and protecting the cable from injury or destruction by enemies of the United States;

(3) That ample repair service shall be maintained, as may be required by the Federal Communications Commission;

(4) That the Licensees or any persons or companies controlled by them or controlling them do not enjoy and shall not acquire any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding or working arrangement to which the Licensees or any persons or companies controlled by them or controlling them are parties;

(5) That the operation of facilities herein authorized shall be limited to the provision of such communication service or services as may be authorized by the Federal Communications Commission for these facilities upon proper application therefor;

(6) That the Government of the United States of America shall be entitled to the same or similar privileges with respect to its official government messages to be transmitted over the cable as may by law, regulation, agreement or otherwise be granted by Licensees to any other government;

(7) That neither this license, the rights herein granted, nor the cable herein authorized shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensees to any persons unless the Federal Communications Commission shall give prior consent in writing;

(8) That this license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or non-fulfillment of any of the conditions set forth herein, or for the reasons specified in Section 2 of the above-cited Act entitled, "An Act relating to the landing and operation of submarine cables in the United States";

(9) That the Licensees shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date, and that upon expiration thereof all rights granted herein shall terminate;

(10) That this license may be transferred upon due notice by the Commission to implement any merger of overseas carriers which the Commission may authorize in the future pursuant to enabling legislation which may be enacted for such purpose;

(11) The terms and conditions upon which this license is given shall be accepted by duly authorized officers of the Licensees, and evidence of said acceptance shall be filed with the Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

41 F.C.C. 2d

F.C.C. 73-655

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMERICAN TELEPHONE & TELEGRAPH CO. AND HAWAIIAN TELEPHONE CO.	File No. S-C-L-44
ITT WORLD COMMUNICATIONS, INC.	File No. S-C-L-44-3
RCA GLOBAL COMMUNICATIONS, INC.	File No. S-C-L-44-2
WESTERN UNION INTERNATIONAL, INC.	File No. S-C-L-44-1
Application for a License To Land and Operate a Submarine Cable Between the State of California and the State of Hawaii	

CABLE LANDING LICENSE

(Adopted June 14, 1973; Released June 15, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONER H. REX LEE ABSENT.

The Commission having under consideration applications, File Nos. S-C-L-44, S-C-L-44-3, S-C-L-44-2, S-C-L-44-1, filed by the American Telephone and Telegraph Company and the Hawaiian Telephone Company, ITT World Communications Inc., RCA Global Communications, Inc. and Western Union, International, Inc. respectively, requesting a license to land and operate jointly a submarine cable between the State of California and the State of Hawaii, HEREBY GRANTS AND ISSUES, under the provisions of an Act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S. Code, Sections 34-39) and Executive Order 10530, dated May 10, 1954 (delegating to the Federal Communications Commission certain presidential functions relating to submarine cable landing licenses) to the American Telephone and Telegraph Company, a corporation organized and existing under the laws of the State of New York, to the Hawaiian Telephone Company, a corporation organized and existing under the laws of the State of Hawaii, and to ITT World Communications Inc., RCA Global Communications, Inc., and Western Union International, Inc., corporations organized and existing under the laws of the State of Delaware, and hereinafter known as the Licensees, a license to land and operate a submarine cable as follows:

A high-capacity single submarine cable with rigid two-way repeaters, and armoring where necessary, of a type designated SF, providing for telephone, telegraph and data communications between the State of California and the State of Hawaii (Mainland-Hawaii III).

subject to the provisions of the above-cited Act entitled "An Act relating to the landing and operation of submarine cables in the United States", the Communications Act of 1934, as amended (47 U.S. Code, Sections 151–609), subsequent applicable Acts and all rules and regulations heretofore or hereafter made by the Federal Communications Commission pursuant to authority vested in it; subject to any treaties or conventions relating to communications to which the United States of America is now or may hereafter become a party; subject to any action by the Commission or the Congress of the United States of America rescinding, changing, modifying, or amending any rights accruing to any person hereunder; and subject to the following conditions:

(1) That the location of the cable within the territorial waters of the United States of America, its territories, and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensees at their expense upon the request of the Secretary of the Army whenever he considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) That the Licensees shall at all times comply with any requirements of appropriate United States Government authorities regarding the location and concealment of the cable buildings and apparatus with a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) That ample repair service shall be maintained, as may be required by the Federal Communications Commission;

(4) That the Licensees or any persons or companies controlling them or controlled by them do not enjoy and shall not acquire any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensees or any persons or companies controlling them or controlled by them are parties;

(5) That the operation of facilities herein authorized shall be limited to the provision of such communication service or services as may be authorized by the Federal Communications Commission for these facilities upon proper application therefor;

(6) That the Government of the United States of America shall be entitled to the same or similar privileges with respect to its official government messages to be transmitted over the cable as may by law, regulation, agreement or otherwise be granted by Licensees to any other government;

(7) That neither this license, the rights herein granted, nor the cable herein authorized shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensees to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(8) That this license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or nonfulfillment of any of the conditions set forth herein, or for the reasons specified in Section 2 of the above-cited Act entitled, "An Act relating to the landing and operation of submarine cables in the United States";

(9) That the Licensees shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date, and that upon expiration thereof all rights granted herein shall terminate;

(10) That this license may be transferred upon due notice by the Commission to implement any merger of overseas carriers which the Commission may authorize in the future pursuant to enabling legislation which may be enacted for such purposes;

(11) The terms and conditions upon which this license is given shall be accepted by duly authorized officers of the Licensees, and evidence of said acceptance shall be filed with the Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-666

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO., LONG LINES DEPARTMENT Revisions of Tariff F.C.C. No. 260 Private Line Services, Series 5000 (TELPAK)	Docket No. 18128
AMERICAN TELEPHONE & TELEGRAPH CO. Revision of American Telephone & Telegraph Co., Tariff F.C.C. No. 260 Series 6000 and 7000 Channels (Program Transmission Services)	Docket No. 18684

MEMORANDUM OPINION AND ORDER

(Adopted June 21, 1973; Released June 26, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONER HOOKS ABSENT.

1. We have before us several petitions for reconsideration* of our Memorandum Opinion and Order FCC 73-502, released May 15, 1973, in this proceeding. In our Memorandum Opinion and Order we established expedited hearing procedures designed to resolve the rate structure or rate relationship issues raised by American Telephone and Telegraph Company Tariff F.C.C. No. 260, Series 7000 Channels, for television program transmission services, and AT&T's Application No. 903 for special permission to file revisions in its "monthly contract" and "occasional" rates for such television program transmission. We also took certain ancillary action with respect to interim rates to be applicable, subject to accounting and refund, pending our expedited procedure.

2. In addition, we have before us several petitions to reject or suspend [1] the tariff revisions filed by AT&T on June 1, 1973, pursuant to our May 15, 1973, Memorandum Opinion and Order in which we stated that AT&T was granted permission to file "forthwith" proposed rates for contract users of program transmission services to become effective on 30 days' notice. Such new monthly contract rates were stated by us to be subject to accounting and possible refunds insofar as they effectuate increases to any customer over either the present or the pre-October, 1969, charges and further subject to such modifications and revisions as we may permit or require in our decision

[1] See Attachment.

on the issues herein. The tariff revisions filed by AT&T herein will become effective on July 1, 1973.[2]

3. In its Petition to Reject, Hughes Sports Network also requests expedited consideration in which HSNI notes that the United States Court of Appeals for the Second Circuit has granted AT&T's motion to the Court for expedited briefing and hearing of AT&T's petition for review of our May 15, 1973, Memorandum Opinion and Order. Hughes contends that the Court should have before it not merely the question of the Commission's power to require prior approval of the filing of a tariff but also the Commission's determination of the lawfulness of that tariff. Hughes accordingly requests that final decision on the rate relationship issues be rendered no later than July 1, 1973.

4. Upon careful consideration of the various requests referred to above, we are of the opinion that all must be denied. First, with regard to the petitions for reconsideration, Section 1.106(a) of our Rules states specifically that, "Petitions requesting reconsideration of interlocutory actions (other than of certain actions not here relevant) ". . . will not be entertained." Our May 15, 1973, Memorandum Opinion and Order does not constitute "final action" by the Commission. As ancillary to our designating this matter for expedited hearing, our Memorandum Opinion and Order allowed AT&T permission to file forthwith the new monthly contract program transmission charges as an interim measure subject to accounting, and possible refunds and to such modifications as may be decided in our final decision on the rate relationship issues. This is clearly interlocutory. In our May 15, 1973, Memorandum Opinion and Order we also provided that if we have not released our final decision after oral argument within 120 days from May 15, 1973, AT&T may file the proposed occasional rates. The decision to permit AT&T to file its tariff within 120 days is also interlocutory under our rules in that the Commission may suspend or reject any such tariffs if decision is not reached herein by the expiration of the 120-day period. No question of lawfulness was determined in our May 15, 1973, action either as to the monthly or the occasional rates. The lawfulness of the relationship between monthly and the occasional rates will be argued at our June 26, 1973, oral argument after which we expect to resolve the rate relationship issues and issue a "final decision" there prior to our self-imposed 120 day deadline.

5. In our May 15, 1973, Memorandum Opinion and Order we designated this matter for oral hearing before the Commission *en banc* on June 26, 1973 and established expedited hearing procedures. In this regard Section 1.106(a) of our Rules provides, in pertinent part, as follows: "A petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to the petitioner's participation in the proceeding. Petitions for reconsideration of other interlocutory actions will not be entertained." Since the petitions for re-

[2] On June 20, 1973, AT&T was granted special permission to file revised schedules that will, in effect, provide that, from July 1, 1973 to August 13, 1973, there will be no increase in net charges to any customer from the presently effective rates in order to effect compliance with Executive Order No. 11723 which provided for the stabilization of prices for a maximum 60-day period.

consideration now before us clearly fail to meet the prerequisite for reconsideration of an interlocutory action, they will be dismissed.

6. With regard to the petitions to reject or to suspend the revised monthly contract rates which are now scheduled to become effective on July 1, 1973,[2] these are also, in effect, petitions to reconsider our action whereby we allowed AT&T to file, on 30 days' notice, the new monthly contract tariff revisions on an interim basis subject to accounting and possible refund. We made it clear in our Memorandum Opinion and Order that we intended these rates to become "effective" as in interim rates *pendente lite* without suspension. For the reasons heretofore stated, and except as reflected in the footnote to paragraph 2 herein, we shall deny these petitions.

7. With regard to Hughes' request that a final decision on the rate relationship issues be rendered no later than July 1, 1973, we are not persuaded that it is essential for us to accelerate our already tight hearing schedule in order to render a decision by that date. The period of 120 days which we have set as a target period within which to resolve the questions raised and to issue a final decision thereon is the amount of time we believe to be reasonably required to deal adequately with the issues.

8. Accordingly, for the reasons stated above, IT IS ORDERED, That the pleadings listed in the Attachment hereto ARE HEREBY DISMISSED OR DENIED.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

ATTACHMENT

1. "Petition for Reconsideration of Memorandum Opinion and Order," filed on May 25, 1973, by The Association of Independent Television Stations, Inc.
2. "Petition for Reconsideration," filed on May 30, 1973, by Hughes Sports Network, Inc.
3. "Petition for Reconsideration," filed on June 4, 1973, by The European Broadcasting Union.
4. "Petition for Reconsideration," filed on June 5, 1973, by UPITN Corporation.
5. "Comments of State Mutual Broadcasting Corporation In Support of Petitions for Reconsideration," filed on June 5, 1973, by State Mutual Broadcasting Corporation.
6. "Petition of State Mutual Broadcasting Corporation to Suspend or Reject Tariff Schedules," filed on June 5, 1973, by State Mutual Broadcasting Corporation.
7. "Petition to Reject Tariff Revisions and Request for Expedited Consideration," filed on June 5, 1973, by Hughes Sports Network, Inc.
8. "Petition for Reconsideration" filed on June 14, 1973, by WGN Continental Broadcasting Company.
9. "Petition for Reconsideration" filed on June 14, 1973, by WPIX, Inc.
10. "Petition for Reconsideration" filed on June 14, 1973, by TVS, Inc.
11. "Opposition to Petitions for Reconsideration" filed on June 15, 1973, by American Telephone and Telegraph Company.
12. "Opposition by ABC, CBS and NBC to Petitions for Reconsideration" filed on June 15, 1973 jointly by the American Broadcasting Companies, Inc., Columbia Broadcasting System, Inc., and National Broadcasting Company, Inc.
13. "Opposition to Petitioners to Suspend or Reject Tariff" filed by ABC, CBS, and NBC on June 19, 1973.

F.C.C. 73-682

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO., LONG LINES DEPARTMENT Revisions of Tariff F.C.C. No. 260 Private Line Services, Series 5000 (TELPAK)	Docket No. 18128
AMERICAN TELEPHONE & TELEGRAPH CO. Revision of American Telephone & Telegraph Co., Tariff F.C.C. No. 260 Series 6000 and 7000 Channels (Program Transmission Services)	Docket No. 18684

ORDER

(Adopted June 25, 1973; Released June 25, 1973)

BY THE COMMISSION.

1. By our Order, FCC 73-630, released June 19, 1973 in the above captioned matter, we specified the parties who were authorized to present oral argument before the Commission *en banc* on June 26, 1973, the order in which such parties were to proceed, and the time allocated to each party. Since the argument pertained to the rate structure of the program transmission services of the Bell System respondents and American Telephone and Telegraph Company (AT&T) Tariff F.C.C. No. 260, we provided that the Bell System respondents would open the argument and could reserve part of their time for rebuttal, thus closing the argument. Our Order made no allowance for rebuttal by any other party.

2. On June 19, 1973, the American Broadcasting Companies, Inc., Columbia Broadcasting System, Inc., and National Broadcasting Company, Inc. (the Network Companies) filed a joint petition seeking fifteen additional minutes time to be used for rebuttal or, alternatively, for permission to reserve a portion of their allotted time for rebuttal purposes. The Network Companies contend that they should have an opportunity to rebut arguments made by other parties during the three hours following the scheduled presentation of their argument. In support of such relief, the Network Companies argue that some of the parties following them can be expected to take views divergent from their views on aspects of the broadcasting industry with which AT&T would not be particularly conversant.

3. The Network Companies' petition will be denied. In Title II common carrier rate proceedings, common carrier respondents have the burden of justifying tariff schedules such as those proposed herein

by AT&T and, accordingly, should open and close proceedings concerning the lawfulness of such tariff schedules. The Network Companies have no similar burden or right of rebuttal. Nevertheless, our denial is without prejudice to the Network Companies being permitted to share in the use of such portion of the rebuttal time reserved by the Bell System respondents as they may agree upon.

4. Accordingly, IT IS ORDERED, That the joint petition of the Network Companies IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-676

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF AUBURN BROADCASTERS, INC., LICENSEE OF RADIO STATION KASY, AUBURN, WASH.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted June 21, 1973; Released June 26, 1973)

BY THE COMMISSION: COMMISSIONER HOOKS ABSENT.

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated July 26, 1972, addressed to Auburn Broadcasters, Inc., the licensee of standard broadcast station KASY, Auburn, Washington, and (2) the licensee's response of August 14, 1972 to the Notice of Apparent Liability.

2. The Notice of Apparent Liability for forfeiture was issued for apparent liability in the amount of five hundred dollars for violation of the terms of the station license for KASY and Section 73.87 of the Commission's Rules, involving operation with power of between 190 and 195 watts, which ranged between 13 to 15 percent in excess of that authorized, from 6:00 a.m. to 7:15 a.m. on November 27, 29, and 30, 1971 and from 6:00 a.m. to 7:45 a.m. on December 1, 2, 3, 4, and 6, 1971, all in Pacific Standard Time. At the time of the violations the station was authorized to operate with power of 168 watts pursuant to a Presunrise Service Authorization (PSA).

3. In response to the Notice of Apparent Liability the licensee states that the overpower was not willful and was caused by a mathematical error in computation by the engineer which resulted in inadequate resistance to decrease power to 168 watts. This is a reiteration of the licensee's earlier reply to the Notice of Violation and was considered by the Commission prior to the adoption of the Notice of Apparent Liability for forfeiture. The licensee further states that the mistake was immediately corrected after the inspection. Licensees will not be excused because their employees may have erred, since licensees are responsible for the acts of their employees, *Eleven Ten Broadcasting Corporation*, 32 FCC 706 (1962); nor will licensees be executed from past violations because of subsequent corrective action, *Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966).

4. The licensee also contends that the violation caused no apparent damage to anyone insofar "as can be determined" and that it has suffered from the results of economic recession in the area with the

result that $500 represents a considerable amount of money. The violations in this case were serious, since they could have caused objectionable interference, and failure of listeners to complain of interference in no sense justifies failure to comply with the Rules of the Commission and the terms of the station authorization. *Industrial Broadcasting Co.* 34 FCC 2d 214. We find that the violations which occurred here were repeated as above set forth and it is therefore unnecessary that we make an additional finding as to willfulness. *Paul A. Stewart*, 63 FCC 411, 25 RR 357 (1963). The licensee's financial condition and past record was considered prior to the adoption of the Notice of Apparent Liability in this case and we find no extraordinary, mitigating circumstances which would merit relief from the liability for forfeiture or reduction in the monetary amount. See *WPRY Radio Broadcasters, Inc.*, 10 FCC 2d 549 (1967).

5. In view of the foregoing, IT IS ORDERED, That Auburn Broadcasters, Inc., licensee of Radio Station KASY, Auburn, Washington, FORFEIT to the United States the sum of five hundred dollars ($500) for failure to abide by the terms and provisions of the station authorization and violation of Section 73.87 of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Auburn Broadcasters, Inc., licensee of Radio Station KASY, Auburn, Washington.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

109-045—73——6

F.C.C. 73-633

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 78 OF THE COMMISSION'S RULES AND REGULATIONS TO ADD AN ALTERNATIVE CHANNEL ARRANGEMENT, REDUCING THE BANDWIDTHS AVAILABLE FOR INTRA-CITY STATIONS, AND ADDING CERTAIN OTHER CLARIFICATIONS	Docket No. 19623 RM-1936

REPORT AND ORDER

(Adopted June 13, 1973; Released June 18, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE ABSENT.

1. By *Notice of Proposed Rule Making*, adopted November 1, 1972, 37 FCC 2d 854, the Commission proposed amendment to Sections 78.18, 78.103, 78.111 and 78.115 of the Commission's Rules and Regulations to: (1) provide an alternative channel arrangement for Local Distribution Service (LDS) stations in the Cable Television Relay (CAR) Service, (2) clarify the rules to make clear the situations in which non-adjacent channels may be used for LDS station operation, (3) provide a channel assignment plan and specify frequency tolerance provisions applicable to stations using double sideband AM transmission, and (4) limit all stations in the CAR service that do not use the frequency-division multiplexed/FM (FDM/FM) system of transmission and that are used for intra-city communication to a 12.5 MHz bandwidth. In addition, the Commission requested comments as to the need for clarification or amendments in the rules to account for any technical or administrative problems unique to return communications channel paths or stations.

2. Comments were received from Microwave Associates, Inc., Theta-Com of California, Cox Cable Communications, Inc., LVO Cable, Inc., Television Communications Corporation, Laser Link Corporation, International Microwave Corporation, National Cable Television Association, Soladyne International, Inc., TelePrompTer Corporation, Collins Radio Company, and Communication Carriers, Inc. Reply comments were received from Athena Cablevision Corp., TelePromp Ter, Theta-Com, CableCom General, Inc., Cox Cable Communications, Inc., American Television and Communication Corporation, and Microwave Associates, Inc.

ALTERNATIVE LDS CHANNEL ARRANGEMENT

3. The first section of the rule making proposed for adoption an alternative channel plan for use in non-repeatered LDS operations that would simply divide the available frequency space into 40 evenly spaced 6 MHz channels. No disagreement with this proposal was expressed in the comments, although the National Cable Television Association again suggested, as it did in response to the initial request for rule making (RM–1936), that the Commission leave the channel allocations within the band unstructured.

4. As pointed out in the *Notice*, the Commission believed, at least initially, that a structured approach would facilitate the processing of applications and was desirable for that reason. The comments filed generally support us in this judgment and we have accordingly determined to retain the structured approach and the channel assignment plan as proposed. We do recognize that the structure we have specified may not be fully compatible with certain systems of on cable channel allocations now in limited use or under development. In order not to inhibit innovation in this area which offers certain possibilities of improved system performance, we will permit the use of non-standard channels on an appropriate showing. Provision for such showings is already included in Section 78.18(e) of the rules which provides in pertinent part "upon adequate showing variation in the use of channels [as specified for LDS stations] may be authorized on a case-by-case basis in order to avoid potential interference or to permit a more efficient use."

ADJACENT CHANNEL USE

5. In this section of the rule making, specific instances were set forth in which we proposed that LDS stations not be required to use adjacent channels. The need for clarification in this respect was acknowledged in all of the comments. The only variation in the proopsal initially suggested was from the Laser Link Corporation which suggested that the use of non-adjacent channels could result in a waste of spectrum space in certain circumstances.

6. As pointed out in the *Notice*, the existing rules now permit the use of non-adjacent channels when there is good cause therefor. Our attempt here has simply been to spell out with particularity those instances where the use of adjacent channels are not practical and, hence, should not be required as a matter of general policy. Moreover, with equipment on the market that allows the simultaneous transmission of video and audio signals in 6 and 12.5 MHz bandwidths, the vacant gaps created by one applicant's use of non-adjacent channels are not necessarily wasted. As Theta-Com's reply comments point out, if an LDS station utilizes frequency slots in Group C corresponding to channels 2 and 4, then the frequencies corresponding to channel 3 are available for use by others utilizing a single channel transmitter within this unused 6 MHz wide channel. Equipment suitable for this purpose has been type accepted by the Commission and is on the market. Accordingly, and within the limitations specified in the rule proposed, we have concluded that non-adjacent channel use should be permitted.

The disadvantages of such usage appear to be outweighed by the increase in the efficiency of LDS stations that would otherwise have to engage in signal conversions at each microwave station receiving location. We are accordingly adopting Section 78.118(e) essentially as proposed.

12.5 MHZ BANDWIDTH LIMITATION FOR INTRA-CITY STATIONS

7. Also proposed in this proceeding was a limitation to a 12.5 MHz bandwidth per channel on all stations in the Cable Television Relay Service that do not use the frequency-division multiplexed/FM system of transmission and that are used for intra-city communications. Our purpose in proposing this bandwidth reduction from 25 to 12.5 MHz was to preserve the availability and increase the efficiency in use of the increasingly congested spectum space that is available to stations in the Cable Television Relay Service. A limitation of some type received general support in the comments received, although some variations on the proposed rule were suggested. In particular, TelePrompTer urged the adoption of rules based on distance covered rather than whether the path applied for was internal or external to the cable television community. Application of the restriction to all stations in the major markets with paths of less than ten miles was recommended. In addition, TelePrompTer suggested that the proposed limitation not apply to mobile pickup stations because these stations could, in particular locations, have communications paths greater than ten miles in length and that applications on file or filed within the next year not be subject to these restrictions in order to give manufacturers sufficient time to develop and market equipment capable of meeting this requirement. In reply, Theta-Com urges that there is no need for a one year moritorium in the rules application because the equipment needed is already on the market. Other comments noted that the narrower band equipment might be more expensive and could result in some increased degradation of the signals being relayed. Nevertheless, the proposed attempt to conserve spectrum space was generally supported.

8. In looking at the questions raised in this portion of the rule making we have attempted to balance the existing and expected scarcity of spectrum space available for assignment to CAR stations and the possibility of alternative uses of this space against the additional cost involved in using narrower band equipment and the possibility that this equipment could, to some extent, tend to degrade the quality of the communications transmitted. We have developed, in the rule we are adopting, what we believe is an appropriate balance of these considerations. We recognize in this process that the potential for spectrum congestion may vary greatly depending on the geography and demography of the area involved. We have, accordingly, attempted to build into the rule a measure of flexibility to permit these

variables to be taken into account. Our original suggestion that all intra-city stations be subjected to this limitation has been rejected because it both failed to include stations used for short haul communications between separate communities in congested areas and because it would apply to long haul communications (10–30 miles) within larger cities. The alternative formulation as adopted will permit the use of a greater than 12.5 MHz bandwidth only in the following circumstances:

(1) the frequency-division multiplexed/FM system of transmission is being used;
(2) a cable television relay pickup station (Section 78.5(d) of the rules) is involved;
(3) the transmission path is more than ten miles in length;
(4) the station was authorized or an application was on file prior to the effective date of the rules adopted herein;
(5) other good cause has been shown that the required use of a bandwidth of 12.5 MHz or less would be inefficient, impractical or otherwise contrary to the public interest.

The last of these provisions is designed to permit use of 25 MHz equipment upon a clear showing that 1) because of the geography, demographics or other characteristics of an area the prospects for alternative users of the available spectrum space are remote, or 2) a signal of adequate quality cannot be relayed using a bandwidth of 12.5 MHz or less. We stress here that a compelling and unusual showing will be required for any such station that is proposed for communication to or from a cable television system in any of the designated cities of the major television markets (Section 76.51 of the Rules).

DOUBLE SIDEBAND AM TRANSMISSION

9. General agreement was received in the comments with our proposal that the rules specifically permit the authorization of stations using double sideband AM transmission and that a channel assignment plan be adopted for such stations. Some concern was expressed, however, with the specific frequency tolerance provisions proposed. International Microwave urged that the frequency tolerance standard would discriminate against manufacturers of double sideband AM equipment in favor of the manufacturers of FM equipment. It suggests that the frequency tolerance standards for 12.5 MHz channel double sideband equipment should be comparable to those for 25 MHz FM channels. Comments of Microwave Associates argue that the proposed reduction of the peak deviation from 4.0 MHz to 1.5 MHz with the highest modulating frequency limited to 4.525 MHz is an overly conservative effort to assure that the signal is kept within the band.

10. While we reject the suggestions that the frequency tolerance for 12.5 MHz double sideband equipment should be comparable to that for 25 MHz FM equipment and that the tolerance discriminates against manufacturers of double sideband AM equipment, we have

concluded that for equipment using 12.5 MHz channels, either double sideband AM or FM, the tolerance standards should be the same. Revised Section 78.111 will require FM and double sideband AM equipment using 12.5 MHz or less authorized bandwidth to operate with a frequency tolerance of 0.005 percent. We believe that this tolerance standard will assure the most efficient use of adjacent channels as well as encourage the manufacture of high quality frequency control apparatus. A transition period of approximately one year (until July 1, 1974) will be afforded manufacturers whose existing lines of equipment do not meet this standard. During this period, we will permit the authorization and operation of equipment if it meets a frequency tolerance of 0.02 percent. Equipment will not be type accepted or authorized for service after that date unless it meets the 0.005 percent standard. In addition we are modifying Section 78.115(b) and dropping the proposed change in Section 78.115(c) to make the CAR service modulation limits for FM transmission consistent with other provision of the Rules, especially Section 2.202.

RETURN COMMUNICATIONS CHANNELS

11. In this section of the proceeding, comments were requested on the need for changes in the rules to account for any technical or administrative problems unique to return communications channel paths or stations. The nature of the comments received as well as our own further consideration of the problems involved suggest that any changes in the rules as this time would be premature and that a further proceeding on this question may be necessary.

12. Basically, the existing rules do not discriminate between forward and return channels of communication. If stations are used to relay a television picture and related audio from an outlying point back to a cable system's headend or central hub for general distribution, few if any unique problems appear to arise. To the extent there are unique problems associated with return channels they appear to relate more to channels of communication that do not contain video information but are part of a system's subscriber response system or relay information that is connected with the system's housekeeping functions (fault location, channel monitoring, etc.). Little information has been received concerning the relation of microwave stations to the transmission of this type of information, so that it appears appropriate to focus on the matter more particularly in a further proceeding after any problems or requirements in this area have become more apparent.

FURTHER PROCEEDING

13. In addition to the possibility of a further proceeding concerning return channels, a number of comments received have suggested the need of the allocation of additional frequency space to the Cable

Television Relay Service. Collins Radio specifically suggests that the band 12.95–13.2 MHz, directly above the CARS band, be opened for intercity cable television system use. According to Collins, the band is essentially unused at the present time.[1]

14. Because of the increasing likelihood of congestion in the CARS band we have taken the frequency conservation measures discussed above. It may also be that additional frequency space can be justified. This, however, is a matter which is beyond the scope of this proceeding and which will require separate consideration.

CONCLUSIONS

15. In light of the foregoing, we conclude that the public interest would be served by the adoption of the rules set forth in the Appendix hereto. Authority for the rules adopted is contained in Section 2, 3(a) and (b), 4(i) and (j), 301, 303, 307(b), 308, 309, and 403 of the Communictions Act.

Accordingly, IT IS ORDERED, That the rules set forth in the Appendix hereto ARE ADOPTED, effective July 26, 1973. IT IS FURTHER ORDERED, That this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX A

Part 78 of Chapter I of Title 47 of the Code of Federal Regulations is amended in the following manner:

1. In Section 78.5, a new definition is added as follows:

Section 78.5 Definitions

* * * * * * *

(h) Authorized bandwidth. The maximum bandwith authorized to be used by a station as specified in the station license. This shall be the occupied bandwidth or the necessary bandwidth, whichever is greater.

2. In Section 78.18, paragraph (a)(2) is amended to revise the lists of Group C and Group D frequencies; subparagraph (a)(4) is added; paragraph (e) is revised; paragraphs (g) and (h) are redesignated as (j) and (k), respectively, and new paragraphs (g), (h), and (i) are added to read as follows:

Section 78.18 Frequency assignments

(a) * * *

(2) * * *

[1] These frequencies constitute the upper half of Band D of the Television Auxiliary Broadcast Service (Part 74, Subpart F of the Rules). The lower half of this band is shared with the CAR service. At the time the creation of the CAR service was first proposed, the Commission considered whether CAR stations should have access to this entire band. *Notice of Proposed Rule Making in Docket 15586*, FCC 64–720, 29 F.R. 11458. Although use of the full band was not authorized, the Commission indicated use of this band might be permitted in individual cases on a waiver basis. *First Report and Order and Further Notice of Proposed Rule Making in Docket 15586*, 1 FCC 2d 897, para. 40 (1965); *Memorandum Opinion and Order in Docket 15586*, 21 FCC 2d 284, para. 7 (1970).

Group C (MHz)	*Group D (MHz)*
12,700.5–12,706.5	12,759.7–12,765.7
12,706.5–12,712.5	12,765.7–12,771.7
12,712.5–12,718.5	12,771.7–12,777.7
12,718.5–12,722.5 [1]	12,777.7–12,781.7 [1]
12,722.5–12,728.5	12,781.7–12,787.7
12,728.5–12,734.5	12,787.7–12,793.7
12,734.5–12,740.5	12,793.7–12,799.7
12,740.5–12,746.5	12,799.7–12,805.7
12,746.5–12,752.5	12,805.7–12,811.7
12,752.5–12,758.5	12,811.7–12,817.7
12,758.5–12,760.5 [1]	12,817.7–12,819.7 [1]
12,760.5–12,766.5	12,819.7–12,825.7
12,766.5–12,772.5	12,825.7–12,831.7
12,772.5–12,778.5	12,831.7–12,837.7
12,778.5–12,784.5	12,837.7–12,843.7
12,784.5–12,790.5	12,843.7–12,849.7
12,790.5–12,796.5	12,849.7–12,855.7
12,796.5–12,802.5	12,855.7–12,861.7
12,802.5–12,808.5	12,861.7–12,867.7
12,808.5–12,814.5	12,867.7–12,873.7
12,814.5–12,820.5	12,873.7–12,879.7
12,820.5–12,826.5	12,879.7–12,885.7
12,826.5–12,832.5	12,885.7–12,891.7
12,832.5–12,838.5	12,891.7–12,897.7
12,838.5–12,844.5	12,897.7–12,903.7
12,844.5–12,850.5	12,903.7–12,909.7
12,850.5–12,856.5	12,909.7–12,915.7
12,856.5–12,862.5	12,915.7–12,921.7
12,862.5–12,868.5	12,921.7–12,927.7
12,868.5–12,874.5	12,927.7–12,933.7
12,874.5–12,880.5	12,933.7–12,939.7
12,880.5–12,886.5	12,939.7–12,945.7
12,886.5–12,892.5	
12,892.5–12,898.5	
12,898.5–12,904.5	
12,904.5–12,910.5	
12,910.5–12,916.5	
12,916.5–12,922.5	
12,922.5–12,928.5	
12,928.5–12,934.5	
12,934.5–12,940.5	
12,940.5–12,946.5	

[1] For transmission of pilot subcarriers, or other authorized narrow band signals.

Auxiliary Channels (MHz)	
12,933.7–12,939.7	12,939.7–12,945.7

* * * * * * *

(4) For cable television relay stations using double sideband AM transmission and FM transmission requiring a necessary bandwidth of no more than 12.5 MHz:

Group I (MHz)	*Group J (MHz)*
12,700–12,712.5	12,712.5–12,725
12,725–12,737.5	12,737.5–12,750
12,750–12,762.5	12,762.5–12,775
12,775–12,787.5	12,787.5–12,800
12,800–12,812.5	12,812.5–12,825
12,825–12,837.5	12,837.5–12,850
12,850–12,862.5	12,862.5–12,875
12,875–12,887.5	12,887.5–12,900
12,900–12,912.5	12,912.5–12,925
12,925–12,937.5	12,937.5–12,950

* * * * * * *

(e) For cable television relay stations using vestigial sideband AM transmission, channels from only Group C or Group D normally will be assigned a station, although upon adequate showing variations in the use of channels in Groups C and D may be authorized on a case-by-case basis in order to avoid potential interference or to permit a more efficient use. In situations where the number or the arrangement of channels available in either Group is not adequate, or in order to avoid potential interference, or in order to achieve the required VHF channelization arrangement on the cable television system or for repeatered operations, or for two way transmission, or upon the showing of other good cause, the use of channels in both Groups C and D may be authorized. Applicants are encouraged to apply for adjacent channels within each group of channels, except that different channel arrangements may be authorized when required to conform to the required channelization arrangement at VHF on the cable television system, when it is necessary to transmit non-adjacent off-the-air channels or signals intended to fill nonadjacent slots in the spectrum, or to avoid potential interference, or upon other showing of good cause.

* * * * * * *

(g) For cable television relay (CAR) stations using doube sideband AM transmission or FM transmission with authorized bandwidth of no more than 12.5 MHz, channels from only Group I or Group J normally will be assigned a station, although upon adequate showing variations in the use of channels in Groups I and J may be authorized on a case-by-case basis in order to avoid potential interference or to permit a more efficient use. The use of channels in both Groups I and J may be authorized where the number of channels in one group is insufficient to accommodate the services proposed to be provided on the cable system, if the Commission finds that such use of channels in both groups is feasible and would serve the public interest.

(h) For double sideband AM transmission, the assigned carrier frequency for each channel listed in Group I or J shall be 6.25 MHz above the lower boundary frequency for each channel, and the sideband frequencies corresponding to the carrier frequency of the accompanying FM aural signal shall be 4.5 MHz above and below the visual carrier frequency.

(i) All stations shall employ no more than a 12.5 MHz authorized bandwidth per channel except in any one or more of the following circumstances:

(1) the frequency-division multiplexed/FM system of transmission is used;

(2) the station is a Cable Television Relay pickup station;

(3) the transmission path is more than ten miles in length;

(4) the station was authorized or an application was on file therefore prior to July 26, 1973.

(3) the transmission path is more than ten miles in length;

(4) the station was authorized or an application was on file therefore prior to July 26, 1973.

(5) other good cause has been shown that use of a bandwidth of 12.5 MHz or less per channel would be inefficient, impractical, or otherwise contrary to the public interest.

* * * * * * *

3. In Section 78.103, paragraph (b) is amended to read as follows:

Section 78.103 Emissions and bandwidth

* * * * * * *

(b) Any emission appearing on a frequency outside of the channel authorized for a transmitter shall be attenuated below the power of the emission in accordance with the following schedule:

(1) For stations using FM or double sideband AM transmission:

(i) On any frequency above the upper channel limit or below the lower channel limit by between zero and 50 percent of the authorized channel width: At least 25 decibels below the mean power of the emission;

(ii) On any frequency above the upper channel limit or below the lower channel limit by more than 50 percent and up to 150 percent of the authorized channel width: At least 35 decibels below the mean power of the emission; and

(iii) On any frequency above the upper channel limit or below the lower channel limit by more than 150 percent of the authorized channel width: At least $43+10 \log_{10}$ (power in watts) decibels below the mean power of the emission.

(2) For CAR stations using vestigial sideband AM transmission: At least 50 decibels below the peak power of the emission.

* * * * * * *

4. Section 78.111 is amended to read as follows:

Section 79.111 Frequency tolerance.

A permittee or licensee in this service shall maintain the carrier frequency of each authorized transmitter within the following frequency tolerance:

Type of transmission	*Tolerance*
FM, including modulation by a frequency-division-multiplexed baseband of standard television signals, using 25 MHz or greater authorized bandwidth.	0.02 percent.
Vestigial sideband AM:	
Visual carrier	0.0005 percent.
Aural carrier	4.5 MHz±1 kHz above visual carrier frequency.
FM and double sideband AM using 12.5 MHz or less authorized bandwidth.	0.005 percent.[1]

5. In Section 78.115, paragraph (b) is revised to read as follows:

Section 78.115 Modulation limits.

* * * * * * *

(b) For stations that employ FM transmission, the total excursion of the radio frequency carrier under modulation and the maximum modulating frequency must be maintained so that the authorized bandwidth is not exceeded in operation. For the purpose of this requirement, twice the sum of the peak frequency deviation (D) and the maximum modulating frequency (M or P) shall not exceed the authorized bandwidth. (See Section 2.202 of this chapter.)

---

[1] This tolerance shall apply to stations authorized on or after July 1, 1974 and to equipment type accepted on or after January 1, 1974. A frequency tolerance of 0.02 percent shall apply to all other equipment of this category.

F.C.C. 73R-229

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
JOHN F. BURNS, THOMAS RIEKE, AND RAYMOND VOSS, D.B.A. BURNS, RIEKE, & VOSS ASSOCIATES, IOWA CITY, IOWA	Docket No. 19596 File No. BP-17838
BRAVERMAN BROADCASTING CO., INC., IOWA CITY, IOWA	Docket No. 19597 File No. BP-19134
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted June 18, 1973; Released June 21, 1973)

BY THE REVIEW BOARD.

1. The mutually exclusive applications of Burns, Rieke and Voss Associates (BRV) and Braverman Broadcasting Company, Inc. (Braverman) were designated for hearing by Commission Order, FCC 72-858 (37 FR 21867, published October 14, 1972). Before the Review Board are a motion for acceptance of petition and petition to enlarge issues, filed October 31, 1972, by BRV [1] seeking the addition of a number of issues against Braverman.[2]

[1] Other related pleadings before the Board for consideration are: (a) Broadcast Bureau's comments, filed December 4, 1972; (b) opposition, filed December 4, 1972, by Braverman; and (c) reply, filed January 9, 1972, by BRV. Also before the Board are: (a) motion for leave to file supplement to petition to enlarge issues, and supplement, filed November 3, 1972, by BRV; (b) request for acceptance of supplement to petition to enlarge issues, and supplement, filed November 7, 1972, by BRV. The BRV motions, unopposed on procedural grounds, will be accepted; the supplements merely add the formal request for a site availability issue and inform the Board of answers to interrogatories which are relevant to the instant petition. A request for official notice was filed by Braverman on March 21, 1973, and comments were filed by BRV and Johnson County Broadcasting Corporation on March 23, 1973. Since the request pertains to matters which the Board would consider in any event, no action on the request is necessary and it will be dismissed.

[2] BRV requests the addition of the following issues:

1. To determine whether A. Kent Braverman, individual applicant, and his successor, Braverman Broadcasting Company, Inc. made misstatements of fact, material omissions or were lacking in candor in their representations in their application to the Commission concerning the following:

(*a*) The availability of the proposed transmitter site and cost thereof.

(*b*) The reasons and representations with respect thereto given in the proposed change of transmitter site filed September 28, 1972.

(*c*) The reports to the Commission of the applicant's survey of community needs and problems.

(*d*) The statements in the application that neither the applicant nor any party to the applicant had interests in any other applications for broadcast facilities.

(*e*) The representations of the availability of credit on equipment purchase.

(*f*) The representations of the applicant with regard to the parties in interest in the application as originally filed and thereafter amended including arrangements and negotiations with respect thereto.

2. To determine in the light of the evidence adduced under the foregoing issue whether Braverman Broadcasting Company, Inc. has the absolute and/or comparative qualifications to be a Commission licensee.

3. To determine whether Braverman Broadcasting Company, Inc. is financially qualified to construct and operate its station as proposed.

4. To determine the efforts made by Braverman Broadcasting Company, Inc. to ascertain the programming needs and interests of the area to be served and the manner in which that applicant proposes to meet such needs and interests.

5. To determine on a comparative basis the significant differences between the applicants with respect to the efforts made by each applicant to ascertain the needs and interests of the community and area each proposes to serve.

6. To determine whether Braverman Broadcasting Company, Inc. has reasonable assurance that its proposed transmitter site will be available.

ANTENNA SITE ISSUES

2. In its application, Braverman specified an antenna site which, according to the coordinate description, is situated on a tract of land owned by Mr. Paul Langenberg;[3] the cost of land quoted in the application was $7,500. By amendment filed September 11, 1972, BRV, after obtaining an option on the Langenberg property, specified the same antenna site. Thereupon, Braverman, stating that specification of its initial site reflected a minor coordinate error, amended its application to specify an adjacent tract directly to the west of the Langenberg property, known as the "Crowley Farm," and submitted therewith a statement by Braverman's consulting engineer, Donald Markley. However, Markley, referring to the above-mentioned description of the site (and specifically the photograph outlining the field) stated that "the site which has been requested is high quality farm ground. It has been determined that moving the site into the area of the brush would be financially more practical. . . ." Based upon the apparent inconsistent statements of Braverman and Markley with respect to the circumstances which prompted the amendment, as well as an affidavit of Paul Langenberg, in which the affiant states that he had not discussed the sale of his property with anyone other than representatives of BRV, petitioner alleges that Braverman had intended to specify the Langenberg site and therefore its subsequent amendment constituted a change of site, rather than a coordinate correction, as represented. Petitioner further alleges that Braverman had never investigated the availability of the Langenberg site and, as a consequence, had misrepresented both the cost and availability of the specified site in its application.

3. In opposition, Braverman asserts that no misrepresentation issue is warranted because it had originally and consistently intended to propose the wooded area of the Crowley Farm as its antenna site, but that, due to a map erroneously marked by Paul Carnegie,[4] its engineer had inadvertently made a three-second error in the coordinates it used to describe its site. Braverman also submits an affidavit by Markley, in which the engineer avers that "[t]he reason for selecting that site [the wooded or brush area of the Crowley Farm] originally was to use ground not actively in use as prime farm land." Moreover, Braverman asserts, it had reasonable assurance of the Crowley site as early as November of 1971, when it commenced negotiations looking towards purchasing the land.[5] With respect to its $7,500 cost estimate, Braverman explains that at the time of its application it would have had to purchase the entire 150 acres of the Crowley Farm for $225,000 in order to obtain the 10–12 acres of land needed for its site, and that the cost of land given in its application, $7,500, was merely the value that it assigned to the smaller segment actually to be used.

[3] The tract was specifically described by: (a) a set of coordinates; (b) a map with the site outlined; (c) a directional relationship (due north) to the site specified in the BRV application, and reference to a photograph of the area in that application; and (d) a photograph with a drawn-in border around a field located to the east of a brush wood area.

[4] Carnegie was at the time aiding Braverman in its application. See paragraph 7, *infra*.

[5] On December 2, 1971, Braverman executed an option for the Crowley Farm; the terms of the option provided for the purchase of the entire 150 acre farm for a cash sum of $225,000.00.

4. Upon consideration of all the pertinent material submitted by BRV and Braverman, as well as the amendments filed by Braverman (including the telegram filed on September 27, 1972, the day this proceeding was designated for hearing), the Board is of the view that BRV's allegations do not support the addition of a misrepresentation issue. In our view, the critical and indisputable facts, are as follows. On December 7, 1971, Braverman initially secured an option for the entire Crowley Farm, which included the area the applicant proposes as its antenna site. Subsequently, on September 28, 1972, after the initial option had expired, Braverman secured a more recent option for ten acres of the Crowley Farm.[6] In view of Braverman's on-going pattern of negotiations for the same site, we believe that there is inadequate basis for disputing Braverman's assertion that he had originally and continually intended to use the southeast corner of the Crowley property for his proposed site.[7] Moreover, although there are discrepancies in the descriptions of the intended site, we believe that in view of the above-described facts, these discrepancies reflect no more than unfortunate confusion. However, while there is no question as to the intended location of Braverman's proposed antenna site, the Board notes that the depiction of its location revealed minor coordinate errors. Apparently, in recognition of this fact Braverman has offered to contract for the services of a Registered Land Surveyor to accurately determine the antenna site coordinates.[8] To assure maximum accuracy in locating the site for decisional purposes, we believe that such a procedure by Braverman is required, and the failure to do so could adversely affect his qualifications.

SURVEY ISSUES

5. In support of its request for a *Suburban* issue, BRV alleges that Braverman's ascertainment efforts are deficient in several respects. Specifically, petitioner alleges: (1) that Braverman failed to survey a cross-section of community leaders inasmuch as it failed to contact, *inter alia*, any religious, agricultural or youth leaders; (2) that a significant number of community leaders listed in its showing either were not contacted by Braverman (who was then an individual applicant) or not contacted at all; and (3) that the applicant failed to conduct community leader consultations throughout its entire proposed service area, particularly in small communities. Moreover, BRV alleges that Braverman misrepresented to the Commission that its community leader consultations had been conducted in the manner required by the *Primer*,[9] and that it had conducted interviews in small communities within its service area. Finally, petitioner asserts that the disparity

[6] Braverman states that when it secured the current Crowley option on September 28, 1972, the option for the 10 acres it required was $25,000. On November 27, 1972, the option was amended to provide for the purchase of 12 acres for $30,000. This option, in the Board's view, is adequate to resolve the question of whether Braverman currently has a site available to it.

[7] While an applicant is required to inform the Commission of the total cost of acquiring property for its antenna site rather than merely the cost of the antenna site proper, Braverman's initial failure to do so, standing alone, is not adequate basis to warrant a misrepresentation issue.

[8] Attachment No. 3 to Braverman's opposition, filed December 4, 1972.

[9] *Primer on Ascertainment of Community Problems*, 27 FCC 2d 650, 21 RR 2d 1507 (1971).

between Braverman's inadequate efforts and those of its own, warrants a comparative efforts issue as well. In this connection, the petitioner points to its allegedly more comprehensive demographic study, the greater number of community leader consultations made throughout its entire service area and the detailed documentation of its efforts which it submitted to the Commission.

6. None of the requested issues relating to Braverman's survey efforts will be added.[10] Braverman's most recent *Suburban* amendment, accepted by Order, FCC 73–352, released March 19, 1973, has cured two of the three alleged survey deficiencies; thus, consultations were conducted with those community leaders allegedly omitted in Braverman's earlier efforts, as well as with additional community leaders in outlying communities and rural areas within the proposed service area. Second, the Board cannot agree with BRV that a significant number of Braverman's community leader consultations were not conducted by appropriate persons; as explained by the applicant, the consultations were made by himself, another principal and a prospective management-level employee, all of which comply with the requirements of question and answer 11(a) of the *Primer*. Nor are we persuaded that Braverman can be faulted for conducting certain consultations by telephone; as explained by Braverman, this method was employed when circumstances precluded face-to-face interviews. Further, Braverman's affirmative representations concerning its efforts do not warrant the addition of a misrepresentation issue. As noted above, the consultations were conducted in accordance with the provisions of the *Primer*, and consultations have been made with community leaders in smaller communities, as documented in Braverman's recent amendment. Finally, the Board agrees with the Broadcast Bureau that the addition of a comparative efforts issue is unwarranted. A review of the applicants' survey efforts indicates that BRV's efforts have been somewhat more comprehensive; however, particularly in view of the recent amendment,[11] it is evident that petitioner has not raised a substantial question as to a significant disparity in the quality and quantity of their respective efforts, sufficient to warrant the addition of the requested comparative issue. See *Chapman Radio and Television Corp.*, 7 FCC 2d 213, 9 RR 2d 635 (1967).

REAL PARTY IN INTEREST

7. On March 22, 1972, Braverman, which had been a single applicant, filed an amendment to its application reflecting the incorporation of the applicant and the inclusion of two minority (10% each) stockholders, Paul Carnegie and Thomas A. Murphy.[12] By pre-designation amendment, filed September 21, 1972, Braverman informed the Com-

[10] Although the issues will be denied on substantive grounds, the Board notes that the bulk of BRV's allegations in this regard are not supported by affidavits from persons having personal knowledge of the matters contained therein, as required by Section 1.229(c) of the Commission's Rules.

[11] *Cf. Eastern Broadcasting Corp.*, 31 FCC 2d 724, 22 RR 2d 966 (1971), in which the Board held that it was not precluded from considering amendments in determining the propriety of adding comparative efforts and programming issues.

[12] Although the amendment revealed the broadcast interests of Carnegie and Murphy in Station WTTO–FM (Peoria, Illinois) and that of Carnegie in Station WQIV–FM (Lake Oswego, Oregon), it did not disclose the existence of the pending application of the licensee of WTTO–FM for a new FM facility in St. Charles, Missouri.

mission that Carnegie and Murphy had relinquished all interest and control in the application; the applicant further informed the Commission that Carnegie and Murphy had acquired an option to purchase a 20% interest in the licensee which could be exercised no earlier than five years from the date the application was granted. BRV requests a real party in interest issue, alleging that the Braverman application is in actuality an application by Carnegie and Murphy. In support of this contention, petitioner notes that both Braverman's attorney and consulting engineer are similarly employed by the Peoria, Illinois, station owned by Carnegie and Murphy, that Carnegie was kept informed of and aided in the preparation of the instant application, and that Braverman had indicated in Section II, paragraph 22 of its application that he would not have sole control over the application. BRV also requests a Section 1.65 issue in view of Braverman's failure to fully inform the Commission of the broadcast interests of Carnegie and Murphy.

8. The request for a real party in interest issue will be denied. BRV's allegations do not indicate either that Carnegie and Murphy presently have undisclosed interests in the applicant, or that an arrangement exists which would permit them to exert control over the applicant. Furthermore, it is unclear as to whether or not the two men actually have a future interest in the applicant; the option, which Braverman has fully disclosed, is merely a promise with no consideration, rather than an enforceable option. In any event, Braverman has adequately explained the circumstances which led to the acquisition and subsequent relinquishment of minority interests in the applicant.[13] *Cf. Martin Lake Broadcasting Co.*, 28 FCC 2d 457, 21 RR 2d 631 (1971). In this connection, we do not believe that the services performed by Carnegie for the applicant suggest a continuing relationship; rather, as explained by Braverman, the aid of an experienced broadcaster was obtained in return for some indefinite repayment which might include a small equity in the applicant. Finally, although an applicant is required to fully inform the Commission of the broadcast applications of its shareholders, we believe that Braverman's single inadvertent failure to do so, in view of the fact that Carnegie and Murphy no longer have any cognizable interests in the applicant, is of little significance. Accordingly, a Section 1.65 issue is unwarranted in this regard.

FINANCIAL ISSUES

9. BRV requests the addition of a financial qualifications issue against Braverman which would inquire into both availability of funds and costs estimates. By Order, FCC 72M–1553, released December 15, 1972, the Administrative Law Judge accepted a financial amendment to Braverman's application which reflects the availability of a $300,000 bank loan commitment. This amount is clearly adequate to finance the applicant's proposal, which according to petitioner's calculations, would require $144,786 for first-year operation and construction costs.

[13] There is no basis for questioning Braverman's explanation that the answer to Section II, paragraph 22, in its application was merely a typographical error.

Contrary to BRV's assertions, Braverman has substantiated the cost estimates for its antenna site and equipment proposal. As indicated previously, the applicant amended its site proposal and submitted a revised cost estimate of $30,000. In response to BRV's allegation that the CAA Electronics Corporation had not extended a letter of credit to Braverman, the applicant has also submitted a letter of reaffirmation from that equipment supplier.[14] Finally, even assuming, as BRV asserts, that Braverman underestimated its equipment costs by some $4,000, Braverman's cushion of available funds is more than adequate to meet any financial contingency.

10. Accordingly, IT IS ORDERED, That the request for official notice, filed March 21, 1973, by Braverman Broadcasting Company, Inc. IS DISMISSED; that the emotion for acceptance of petition, filed October 31, 1972, and the motions for leave to file supplement, filed November 3, 1972, and November 7, 1972, by Burns, Rieke and Voss Associates ARE GRANTED; and

11. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed October 31, 1972, by Burns, Rieke and Voss Associates, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[14] BRV's allegations of misrepresentation with respect to the availability of this line-of-credit are sheer speculation and surmise, and the request can only be characterized as frivolous.

F.C.C. 73-678

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CALIFORNIA WATER & TELEPHONE CO. Tariff F.C.C. No. 1 and Tariff F.C.C. No. 2 Applicable to Channel Service for Use By Community Antenna Television Systems	Docket No. 16928
In the Matter of THE ASSOCIATED BELL SYSTEM CO. Tariffs for Channel Service for Use by Community Antenna Television Systems	Docket No. 16943
In the Matter of THE GENERAL TELEPHONE SYSTEM & UNITED UTILITIES, INC., COS. Tariffs for Channel Service for Use by Community Antenna Television Systems	Docket No. 17098

ORDER

(Adopted June 21, 1973; Released June 26, 1973)

BY THE COMMISSION: COMMISSIONER HOOKS ABSENT.

1. In accordance with our Memorandum Opinion and Order released May 23, 1973, FCC 73-541, oral argument WILL BE held on the issue of whether the Commission has jurisdiction over the agreements or arrangements of telephone companies, electric utilities, and others with respect to pole line attachment or conduit agreements or arrangements with CATV operators beyond that exercised in its decision in Docket 18509 and, if so, the extent and nature of such jurisdiction and what action, if any, the Commission should take with respect thereto as set forth in said Memorandum Opinion and Order before the Commission *en banc* on July 24, 1973, commencing at 9:30 a.m.

2. Having considered the written notices of intention to appear and participate in oral argument, IT IS ORDERED:

109-045—73——7

(a) That the parties here designated ARE AUTHORIZED to present oral argument in the following order for the times designated:

	Minutes
Cable television:	
National Cable Television Association	30
California Community Television Association	30
Warrensburg Cable, Inc	5
Central California Communications Corp	5
John D. Matthews	5
Cablecom-General, Inc	5
Telephone common carriers:	
Bell System	30
General System	30
United Telephone System	15
United States Independent Telephone Association	10
Continental Telephone Corp	10
Public utilities:	
Utilities Telecommunications Council	30
American Public Power Association	5
Long Island Lighting Co	5
Regulatory agencies:	
National Association of Regulatory Utility Commissioners	30
New York Public Service Commission	10
New York Commission on Cable Television	10
Wisconsin Public Service Commission	10
Others:	
American Broadcasting Cos., Inc	5
National Association of Broadcasting	5

(b) That the Cable Television, the Telephone Common Carriers and the Public Utilities MAY RESERVE part of their time for rebuttal.

(c) That any party hereto may allocate their time for oral argument in full or part to another party upon notification to the Commission.

(d) That the Objection to Appearance filed by the National Cable Television Association IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-677

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 1 OF THE COMMISSION'S RULES—PRACTICE AND PROCEDURE—WITH RESPECT TO THE ASSIGNMENT OF NEW AND MODIFIED CALL SIGNS TO AM, FM, AND TV BROADCASTING STATIONS	Docket No. 17477

REPORT AND ORDER

(Adopted June 21, 1973; Released June 25, 1973)

BY THE COMMISSION: COMMISSIONER HOOKS ABSENT.

1. The Commission released a Notice of Proposed Rule Making (FCC 67-634) in the above captioned matter on May 26, 1967, which was published in the Federal Register on June 1, 1967, (32 FR 7917). Interested parties were invited to file comments on or before July 3, 1967, and reply comments on or before July 13, 1967.

2. That Notice proposed specific amendments to section 1.550 of the rules to reflect Commission policy and case law applicable to broadcasting station call sign assignment matters, and to resolve related problems which had arisen since the adoption of the section in 1964. Seven comments were received. Storer Broadcasting Company supports codification of existing policy requirements that call signs be in good taste and not confusingly similar to others in the area; that only "W" call signs be assigned east of the Mississippi River and only "K" call signs west of the river; and that call signs be awarded on a first-come-first-served basis. However, Storer questions whether the public interest would benefit from a proscription of what was depicted in the Notice as "trafficking" in call signs; i.e., the manipulation of the availability of call signs which are in the process of relinquishment or deletion, and in support of its position, points to the hypothetical circumstance where the relinquished call sign has no significance to the relinquishing licensee or permittee but does to the licensee or permittee seeking to acquire it. Finally, Storer asks that provision be made to transfer a call sign from one station to another station, possibly newly acquired, under the same ownership. In particular, Storer requests that existing three-letter call signs should be conformable to other stations owned, or being acquired by, the same licensee.

3. The latter point was also addressed by King Broadcasting Company. King, then and now the licensee of stations KGW and KGW-TV, Portland, Oregon, among others, which has since acquired station KGW-FM, Portland, urged the Commission to make clear in the rules that licensees of stations having three-letter call signs will be

able to add appropriate suffixes upon the acquisition of stations in the same cities in different services. King does not address any other part of the Notice. These comments were filed on July 3, 1967; the call sign KGW–FM was assigned to the same licensee on December 5, 1967. In this connection, it was never intended that a three-letter basic call sign would *per se* bar the assignment of a conforming call sign to a commonly owned station in the same or adjoining community.

4. Columbia Broadcasting System, Inc., supports the Commission's proposal to amend section 1.550 but, like Storer, does so on the assumption that a licensee or permittee seeking to transfer a call sign from one to another of its broadcasting properties would not be deemed, by virtue of such transfer, to be relinquishing, within the meaning of proposed paragraph (h), the call sign so as to call into play the public notice procedure.

5. The Tribune Company, licensee of stations WFLA, WFLA–FM and WFLA–TV, Tampa, Florida, supports the proposed amendment to section 1.550, except for a claimed lack of precision with respect to proposed paragraph (i), i.e., that to be eligible for conforming call signs (e.g., WFLA, WFLA–FM and WFLA–TV), stations must meet certain criteria, including their being licensed to "the same or adjoining communities." Tribune would substitute therefor: "the same community or to the same urbanized area as defined by the U.S. Census." In a similar manner, the comments of Southern Broadcasting Company addressed only the question of eligibility for conforming call signs. With respect to the requirement that conformed stations be assigned to the "same or adjoining", Southern would either add "or communities in close proximity to one another" or would substitute the Standard Metropolitan Statistical Area (SMSA) concept.

6. The comments of Odessa Broadcasting Company, by its attorneys, were directed to a different aspect of eligibility for conforming call signs. In place of our proposal to determine "common control" on the basis of 50 percent or greater common ownership, Odessa would substitute "common operational control" and would make common management the *prima facie* standard of eligibility.

7. The law firm of Midlen and Harrison (now Midlen and Reddy) registers general support of the proposals contained in the Notice, but states the belief that the rules should provide for the receipt and evaluation of information from competing applicants for the same call sign covering matters other than length of service. Further, they indicate their having received numerous requests from clients desiring call signs incorporating the initials of former Presidents of the United States, and urge the inclusion of the Commission policy on this matter in the rules. That policy is that an otherwise available call sign whose last three letters form the initials in their usual sequence of the President of the United States, or of a living former President, is unavailable without suitable clearance for assignment to a standard, FM or TV broadcasting station licensed or authorized for construction by the Commission. Finally, they allude to the recurring problem of how soon a deleted call sign may be reassigned in the same community without creating undue public confusion.

8. The suggestion by *Storer* and *CBS* that multiple owners and network organizations be permitted to transfer call signs from one broadcast property to another without regard to the procedural provisions of section 1.550 (paragraphs 2 and 4, supra), must be rejected. Apart from affording preferential treatment to such organizations vis-a-vis the independent stations with which they compete, we see no way of assuring phonetic dissimilarity among call signs in the same market without subjecting all call sign requests, including intra-corporate call sign transfers, to the same ground rules. Moreover, under the formula proposed in section 1.550(h) for choosing among competing requests for the same relinquished or deleted call sign, the applicant with the ". . . longest continuous record of operation under substantially unchanged ownership and control" would prevail over other applicants. Since multiple owners and network organizations tend to meet this length of service test by virtue of their seniority in the industry, their concern in this regard appears to be without foundation.

9. We also decline to relax existing requirements for the issuance of conforming call signs; i.e., that qualifying stations be under common control (evidenced by 50 percent common ownership) and be assigned to the same or adjoining communities. The treatment of 50 percent or greater common ownership as a *prima facie* showing of common control accords, we think, with accepted norms of determining corporate control and avoids the morass of *de facto* control determinations outside the context of formal applications for consent to assignment or transfer of control. Further relaxation in this regard, as urged by *Odessa* (paragraph 6, supra), would be unworkable from an administrative standpoint and must therefore be rejected. By the same token, the substitution of urbanized areas, SMSA's, or like standards for the present requirement that conforming calls be used in the "same or adjoining communities", cannot be justified either in practical terms or in the public interest. This requirement derives from public notices adopted in 1949 and 1965 (FCC 49–24 and FCC 65–282), and was last considered in *Eastern Oklahoma Television Company*, 28 FCC 2d 31 (1971). In *Eastern*, we reaffirmed our view that the issuance of common call signs to broadcasting stations in different services, unless under common control and assigned to the same or adjoining communities, unnecessarily confuses the listening and viewing public as to station location. This would be particularly true in AM/FM simulcast operation where, by reason of identical programming, the identification of each station with the community of license would be even further diluted. Finally, it is reasonable to assume that the use of conformed call signs by stations in non-adjoining communities would work an unwarranted and unnecessary competitive disadvantage on independent stations in the same general area. The changes proposed by *Tribune* and *Southern* in this regard (paragraph 5, supra) are therefore rejected.

10. *Midlen* (paragraph 7, supra) cites recurring problems in call sign assignment practices which have been taken into account in drafting the rules adopted herein. Perhaps the most troublesome is fixing limits on our policy of indefinitely withholding the reassignment of relinquished or deleted call signs in the same community, except to the

same station or its successor-in-interest. *Shepard Broadcasting Company*, 16 FCC 2d 718 (1969); *Great Lakes Broadcasting Corporation*, 26 FCC 2d 705 (1970). This policy is premised on the belief that the early reassignment of a relinquished or deleted call sign in the same community tends to create the erroneous impression among listeners and viewers that the same principals are involved in the new operation. Clearly, the longer reassignment of the call is withheld, the less likelihood there will be of identification, in the minds of the public, with the former licensee. We conclude that a six-month interval should be sufficient to dissipate this type of confusion, and have written the rule accordingly—section 1.550(n). *Midlen's* proposal to consider factors other than applicants' length of service as a means for choosing from among competing requests for the same relinquished or deleted call sign must, however, be rejected on the ground that it would needlessly compel us to make value judgments in an area where public interest considerations are minimal.

11. No unfavorable comment was received regarding proposed subsections 1.550 (e), (f), (g), (j) and (k). These dealt, in turn, with the availability of "W" versus "K" call signs; the unavailability of new three-letter call signs; the standards for judging claims of phonetic and rhythmic similarity; simplified procedures where the only modification is the addition or deletion of "–FM" or "–TV" suffixes in the call sign assignment; and the procedure to be followed if no call sign request for a new station is filed in compliance with the rules. Accordingly, these provisions are being incorporated into the rules. Language has been added to proposed subsection 1.550(f) to make clear that Commission policy allows the assignment of a conforming available three-letter call sign (plus FM and TV, if appropriate) to a newly acquired station under common control and assigned to the same or an adjoining community. This accords with the comments of *Storer*, and *King* (paragraphs 2 and 3, supra).

12. We have already touched on the problem of "trafficking" in call signs in the limited context of call sign reassignments within the same organization—paragraph 8, supra. The basic "trafficking" problem lies elsewhere, however, and arises as a by-product of the "first-come-first-served" principle under which our receipt of a written, nondefective application for an available call sign blocks the acceptance of competing requests therefor until the first-received request is processed to completion. Specifically, the party relinquishing a call sign and the party wishing to acquire it can, by pre-arrangement, control its "availability" date by appropriate timing of their respective requests for an effective date for the new call and for reassignment of the relinquished call. Not infrequently, these requests are made by the same attorney, acting on behalf of both. We continue to view this practice as being unfair to other parties having a legitimate interest in the relinquished call sign, and as bordering on abuse of Commission process. Experience gained since 1967 only reinforces our concern in this regard. Actually, the problem is broader than that addressed in 1967, in that there now appears to be "trafficking" in four-letter signs (or four-letter combinations commencing with "W" or "K" assigned by the Department of Transportation as signal letters to vessels) assigned

for use by licensees in the Maritime Mobile Service and to stations operated by the United States Government. Various government agencies have expressed their concern over these practices because of the disruption caused to the registration of affected stations. We find that the public interest requires that these abuses be curbed by giving public notice of relinquished and deleted call signs sought by broadcasters, thereby affording all interested parties an opportunity to compete therefor on the basis of longest continuous record of operation under substantially unchanged ownership and control. In this regard, section 1.550(h) is adopted herein essentially as proposed.

13. Policies dealing with miscellaneous aspects of call sign assignment have also been incorporated into the rules. These concern effective dates of call sign changes; non-licensed, low-power devices operating under Part 15 of the rules; and the policy against reservation of call signs. Finally, we note that applicants frequently proceed on the erroneous assumption that if a four-letter call sign is not assigned to a Commission-licensed broadcasting station, it is automatically available for assignment. Many four-letter call signs are assigned to vessels in documentation and to other nonbroadcasting radio stations, and a paragraph has been added to indicate their non-availability—section 1.550(m).

14. We wish to call attention to various petitions for rule making, filed after proceedings in Docket No. 17477 were initiated, involving the assignment and use of call signs in the broadcasting services: Lincoln Broadcasting Company, *et al.* (RM–1451); Straus Broadcasting Group (RM–1891); and Suffolk Broadcasting Corporation (RM–2136). *Lincoln* and *Suffolk* would prohibit the assignment of common call signs to commonly owned AM and FM stations, alleging that existing practices have an unfair competitive impact on independent FM stations; *Straus* proposes minor changes in current station identification requirements. Since these proposals are outside the scope of matters considered in this proceeding, they will be separately considered at another time. In addition, we are concerned with the spiraling workload generated by seemingly frivolous requests for call sign changes; the Office of Chief Engineer and the Re-regulation Task Force will address this problem, along with the need for any on-air call sign identification, in the near future.

15. Authority for the adoption of this Report and Order is contained in sections 4(i), 303(o), 303(p), 303(r) and 305(c) of the Communications Act of 1934, as amended. Those rules and rule revisions adopted herein for which prior notice was not given reflect policies and practices generally accepted in the industry and are therefore not viewed as controversial. Under these circumstances, we find that further notice of proposed rule making under the Administrative Procedure Act (5 U.S.C. 553) would serve no useful purpose.

16. Accordingly, IT IS ORDERED, That effective *August 6, 1973*, section 1.550 of the rules IS AMENDED as set forth in the Appendix.

17. IT IS FURTHER ORDERED, That proceedings in Docket No. 17477 ARE HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Part 1 of the Commission's rules is amended to read as follows:

§ 1.550 Requests for new or modified call sign assignments.

(a) Requests for new or modified call sign assignments for standard, FM or television broadcasting stations shall be made by letter to the Secretary, Federal Communications Commission, Washington, D.C. 20554. An original and one copy of the letter shall be submitted and shall be accompanied by the filing fee, if required, specified in section 1.1111 of this chapter. Incomplete or otherwise defective filings will be returned by the Commission, and any filing fee submitted in connection therewith will be forfeited 45 days from the date the application is returned should the applicant fail to submit an acceptable call sign application for the same station within that period.

(b) (1) No request for a new call sign assignment will be accepted from an applicant for a new station until the Commission has granted a construction permit.

(b) (2) An applicant for transfer or assignment of an outstanding construction permit or license may, in accordance with this section, request a new call sign assignment at the time the application for transfer or assignment is filed, or at any time thereafter. In the absence of written consent of the proposed transferor or assignor, no change in call sign assignment will be made effective until such application is granted by the Commission and the transaction consummated.

(b) (3) Where an application is granted by the Commission for transfer or assignment of the construction permit or license of a station whose existing call sign conforms to that of a commonly owned station not part of the transaction, the assignee shall, within 30 days after consummation, request a different call sign in accordance with the provisions of this section. Should a suitable application not be received within that period of time, the Commission will, on its own motion, select an appropriate call sign and effect the change in call sign assignment.

(c) Each request submitted under the provisions of paragraphs (a) and (b) of this section shall include the following:

(c) (1) A statement that a copy of the request has been served upon each standard, FM or television broadcasting station licensed to operate, or whose construction has been authorized, in communities wholly or partially within a 35-mile radius of the main post office of the applicant's community of license, and a list of the call signs and locations of all stations upon which copies of the request have been served.

(c) (2) Subject to the other requirements of this paragraph, as many as five call signs, listed in descending order of preference, may be included in a single request.

(d) (1) No request for call signs subject to the provisions of this paragraph will be acted upon by the Commission earlier than 30 days following issuance of public notice of the receipt of such request. Applicants for new or modified call signs are cautioned to take no action in reliance on securing the desired call sign until notified by the Commission that the request has been granted.

(d) (2) Objections to the assignment of the requested call signs may be filed within the 30-day period following issuance of public notice of the receipt of such request. Copies of objections shall be served on the party making the request. Objections filed after the 30-day period will be considered only if, in the judgment of the Commission, good cause has been shown for failure to file within the time specified. A reply may be filed within 10 days of the filing of the objection, a copy of which shall be served on the objector. No further pleadings will be entertained, unless specifically authorized by the Commission.

(e) Call signs beginning with the letter "K" will not be assigned to stations located east of the Mississippi River, nor will call signs beginning with the letter "W" be assigned to stations located west of the Mississippi River, except where necessary to conform the call sign assignments of stations which otherwise qualify for common call signs.

(f) Only four-letter call signs (plus FM or TV suffixes, if used) will be assigned. However, subject to the other provisions of this section, a new or acquired station may be conformed to a commonly owned station holding a three-letter call sign assignment (plus FM or TV suffixes, if used).

(g) Subject to the foregoing limitations and provided the call sign is available for assignment, licensees and permittees are eligible to apply for call signs of their choice if the requested combination is in good taste and is sufficiently dissimilar phonetically and rhythmically from existing call signs of stations in the same service area so that there will be no significant likelihood of public confusion.

(h) Call signs are normally assigned on a "first-come-first-served" basis, in accordance with which the receipt by the Commission of a request for an available call sign blocks the acceptance of competing requests until the first-received request is processed to completion; ***Provided,***

That in the case of call signs being relinquished or deleted, the Commission will announce the availability thereof by public notice. If competing requests are filed within 15 days, the assignment (if otherwise grantable) will be made to the station having the longest continuous record of broadcasting operation under substantially unchanged ownership and control. However, involuntary and *pro forma* assignments and transfers will not be taken into account in determining priority under this paragraph.

(i) Stations in different broadcasting services which are under common control and assigned to the same or adjoining communities may request that their call signs be conformed by the assignment of the same basic call sign. For the purposes of this paragraph, 50 percent or greater common ownership shall constitute a *prima facie* showing of common control.

(j) The procedural provisions of this section shall not apply to international broadcasting stations, to stations in the experimental, auxiliary, and special broadcasting services, nor to FM or television broadcasting stations seeking to modify an existing call sign only to the extent of adding or deleting an "–FM" or "–TV" suffix. The latter additions and deletions may be requested by letter, accompanied by the necessary filing fee, if applicable.

(k) Failure by the permittee of a new station to request the assignment of a specific call sign and to complete the action required by this section will result in the assignment of identification by the Commission on its own motion.

(l) In the absence of an objection, or pending transfer or assignment of a license or construction permit, a change in call sign assignment will be made effective on the date specified in the related public notice. Postponement of the effective date will be granted only in response to a timely request and for only the most compelling reasons.

(m) Four-letter combinations commencing with "W" or "K" which are assigned as signal letters to vessels in documentation or to other radio stations are not available for assignment to stations in the broadcasting services, with or without the suffix "–FM" or "–TV".

(n) A call sign previously assigned to a station in the broadcasting services will not be reassigned to another broadcasting station in the same community within 180 calendar days from its relinquishment, except to the same licensee or permittee or to its successor-in-interest.

(o) Users of non-licensed, low-power devices operating under Part 15 of this chapter may use whatever identification is currently desired, so long as propriety is observed and no confusion results with a station for which the Commission issues a license.

(p) A call sign whose suffix forms the initials in their usual sequence of the President of the United States, of a living former President, or of the United States of America or any department or agency thereof, is unavailable for assignment to a station in the broadcasting services in the absence of suitable clearance.

(q) A call sign may not be reserved. Where a licensee or permittee declines to indicate a specific desired effective date for the requested change of call sign assignment, the Commission will effect the change in assignment on a date at least 21 days after approval thereof.

(r) Call sign assignment changes will not be made effective retroactively.

F.C.C. 73-652

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART 0, SUBPART A OF THE COMMISSION'S RULES AND REGULATIONS CONCERNING ORGANIZATION OF THE CABLE TELEVISION BUREAU

ORDER

(Adopted June 13, 1973; Released June 18, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON ABSTAINING FROM VOTING: COMMISSIONER H. REX LEE ABSENT.

1. Implementation of the Commission's cable television regulatory program has been entrusted to the Cable Television Bureau and its predecessor CATV Task Force since late 1966.[1] When the Bureau was established in January, 1970 to replace the Task Force, the Commission indicated that staff and organization would be determined at a later date. With the adoption of the *Cable Television Report and Order* in February, 1972, the wisdom and necessity of formally organizing the Bureau to implement the new cable program became apparent. To aid in this task, the Commission awarded the management consulting firm of Harbridge House, Inc., of Boston, Massachusetts, a contract to perform an organization and procedures study of the Bureau. The final Harbridge House report was submitted on March 30, 1973.

2. We have examined Harbridge House's organizational recommendations and are in substantial agreement with them. The Commission has concluded that the Bureau should be organized into four divisions with a separate Office of the Chief. These divisions will be designated as follows: Certificates of Compliance Division; Special Relief and Microwave Division; Policy Review and Development Division; and Research Division. In addition, the first two divisions will be subdivided into appropriate branches.

3. We believe that the proposed organization will facilitate execution of the Bureau's mission, and will promote greater efficiency and effectiveness in Commission operations. Hence, we are amending Part 0 of the Rules accordingly. Since this amendment relates to internal Commission organization and practice, the prior notice provisions of Section 4 of the Administrative Procedure Act, 5 U.S.C. 553, do not apply, and the amendment can be made effective immediately.

[1] The Task Force was formally established on December 21, 1966 (*Order*, FCC 66-1182, released December 27, 1966); however, creation of a special task force on "CATV" was actually first announced by the Commission on August 19, 1966.

Authority for the amendment adopted herein is contained in Sections 4(f) and (i) and 5(b) of the Communications Act of 1934, as amended.

Accordingly, IT IS ORDERED, That effective June 25, 1973, Part 0 of the Commission's Rules and Regulations IS AMENDED as set forth in the attached Appendix.

FEDERAL COMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 0—COMMISSION ORGANIZATION

A new Section 0.86 is added to Subpart A, to read as follows:

§ 0.86 Units in the Bureau.

The Cable Television Bureau is divided into the following units:
(a) Office of the Bureau Chief;
(b) Certificates of Compliance Division;
(c) Special Relief and Microwave Division;
(d) Policy Review and Development Division;
(e) Research Division.

F.C.C. 73-658

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of COMMUNICATIONS SATELLITE CORP. Investigation Into Charges, Practices, Classifications, Rates, and Regulations	Docket No. 16070

MEMORANDUM OPINION AND ORDER

(Adopted June 21, 1973; Released June 26, 1973)

BY THE COMMISSION: COMMISSIONER HOOKS ABSENT.

1. Before the Commission for consideration is a Petition for Extraordinary Relief and Appeal from Presiding Judge's Adverse Ruling filed in the above entitled proceeding on April 23, 1973, by the Trial Staff of the Commission's Common Carrier Bureau.[1] Therein the Trial Staff requests: (1) that the Commission waive Section 1.301(b) of the Rules which requires the permission of the presiding Administrative Law Judge to appeal an adverse interlocutory ruling, and (2) that the Commission reverse the ALJ's rulings which excluded an exhibit proffered by the Trial Staff and limited cross-examination of a witness who testified on behalf of the Communications Satellite Corporation (Comsat) as an expert witness. Comsat opposes the petition on the grounds that it was untimely filed, that no sufficient justification for a waiver of the Rule has been alleged, and that allowance of the appeal would be inconsistent with Commission precedent which limits interlocutory appeals to those raising fundamental questions which may affect the conduct of the entire case. A brief statement of the background facts is necessary to a consideration of the issues raised by the Trial Staff's petition.

2. This proceeding involves a review of the operations of Comsat and, among the matters under consideration, are the Company's accounting practices and policies. In this connection, Comsat called as an expert witness its Comptroller, Joseph L. Mahran. On cross-examination, Trial Staff counsel questioned the witness about the Company's treatment of interest during construction (IDC) to which he responded that "[I]f there is one subject that I think I am expert in, that is interest during construction; I wrote my Master's thesis on interest during construction" (Tr. 6890). At the request of Trial Staff counsel, the thesis was produced and turned over to the staff for examination.

[1] Also before the Commission are the opposition filed on April 30, 1973, by the Communications Satellite Corporation and the reply to the opposition filed by the Trial Staff on May 4, 1973.

3. According to the Trial Staff, its review of the thesis disclosed that significant portions of the document were copied verbatim from sources mentioned by Mr. Mahran in the bibliography appended to his work, that other portions merely paraphrased material from such sources, and that in many instances, the thesis contained no attribution for the material thus copied or paraphrased. The Trial Staff therefore prepared a document comparing the text of the thesis with the text of the original source material from which it was allegedly copied or paraphrased. The Trial Staff's document was marked as Exhibit No. 154, and it was offered into evidence as a basis for further cross-examination of the witness. Upon objection by Comsat, the ALJ excluded the Exhibit and he refused to permit questioning of the witness with respect to any material in the thesis which may have been copied without attribution. The Trial Staff requested but was refused permission to appeal the ALJ's ruling. The ALJ's oral ruling was issued on April 11, 1973.

4. Section 1.301(b) of the Commission's Rules provides as follows:

> (b) Other interlocutory rulings. Except as provided in paragraph (a) of this section, appeals from interlocutory rulings of the presiding officer shall be filed only if allowed by the presiding officer. Any party desiring to file an appeal shall first file a request for permission to file appeal. The request shall be filed within 5 days after the order is released or (if no written order) after the ruling is made. Pleadings responsive to the request shall be filed only if they are requested by the presiding officer. The request shall contain a showing that the appeal presents an important question of law or policy as to which there is substantial ground for difference of opinion and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception. The presiding officer shall determine whether the showing is such as to justify an interlocutory appeal and, in accordance with his determination, will either allow or disallow the appeal or modify the ruling. If the presiding officer allows or disallows the appeal, his ruling is final: Provided, however, That the Review Board or the Commission may, on its own motion, dismiss an appeal allowed by the presiding officer on the ground that objection to the ruling should be deferred and raised as an exception. In the discretion of the presiding officer, the request for permission to file appeal may be made orally, on the record of the proceeding, and if made orally, may be disposed of orally.

5. Since the consent of the ALJ to file an appeal was not obtained and the Trial Staff's petition was not filed until more than five days after the issuance of the ALJ's oral ruling, the first question to be resolved is whether this appeal should be entertained. We do not believe that it should be. Even where denial of permission to appeal was not involved we have held that presiding officers possess broad authority in conducting hearings and in ruling on the admissibility of evidence; and that an evidentiary ruling will not be reviewed unless the ruling complained of is fundamental and affects the conduct of the entire proceeding. *Midwest Television, Inc.*, 8 FCC 2d 550 (1967). See also, *Western Connecticut Broadcasting Company*, 31 FCC 2d 807 (Rev. Ed., 1971). Another decision which is pertinent here is *Bay Broadcasting Co. et al.*, 10 FCC 2d 331, 332 (1967) where we held as follows:

> If the Commission is to have any kind of orderly and efficient hearing process, pleadings essentially interlocutory in nature must be considered and ruled upon by the hearing examiner, and except where there is manifest abuse of discretion or clearly unauthorized action, should not be reviewed by the Commission or

Review Board until the hearing has been completed and a report or decision made or the record transferred to the Review Board or Commission.

6. Here we have the added factor that under the express provisions of Section 1.301(b), the presiding officer must first determine whether the appeal from the interlocutory ruling presents an *important* question of law or policy as to which *substantial* ground for a difference of opinion exists and a finding of error is likely to require a remand. Furthermore, not only is the presiding officer's permission a prerequisite to an appeal, but his decision to disallow an appeal is made final. In the rulemaking proceeding in which this Rule was promulgated, the Commission rejected a proposal that an appeal be allowed from the presiding officer's disallowance of an appeal on the ground, among others, that "the benefits of the proposal would be lost" by a provision for such an appeal. The benefits of the Rule may likewise be lost by a liberal grant of waivers. A strict application of the Rule is therefore essential, and we so indicated in connection with a previous appeal by the Trial Staff in the case under consideration. While we granted a waiver of Section 1.301(b) in that instance, we nevertheless held: [2]

> This rule is designed to ensure orderly procedure and to prevent the almost interminable delays which could take place if proceedings hereto be stayed every time a party is dissatisfied with an Examiner's ruling on interlocutory matters and seeks to have either the Commission or the Review Board to pass upon the ruling. Accordingly, it has been and continues to be our policy not to entertain such motions except where it is shown that there has been such a flagrant abuse of discretion as would inevitably require a reversal of the Initial Decision and a hearing *de novo;* or where the proceeding involves basic and far reaching considerations of public policy and vital concerns relating to the public interest which could not otherwise adequately be protected.

Consequently, we do not propose to grant a waiver of the requirement for the consent of the presiding officer to an appeal from an evidentiary ruling unless a substantial showing is made that particularly significant circumstances exist which make imperative the taking of such action.

7. The Trial Staff asserts that the issue raised by its petition is fundamental to the disposition of this case and that unless the requested relief is granted, a later reopening of the record will be required with a resultant delay in the conclusion of this proceeding. The proffered exhibit was admissable, the Trial Staff claims, both for the purpose of questioning the expertise of the witness on IDC and for the purpose of challenging the credibility of the witness and the weight that should be given to his opinions. It argues that if the witness committed substantial plagiarism by copying the work of others in his thesis without attribution, it would be indicative of an intent to deceive and mislead academic authorities and would constitute "a gross violation of the standard of academic honesty required of a candidate for an advanced degree." Such conduct, it is stated, would reflect adversely on the credibility of the witness and the reliability of his testimony; but that those matters cannot be developed unless proffered Exhibit No. 154 is admitted into evidence and the Trial

[2] *Communications Satellite Corporation,* 32 FCC 2d 533, at 534, released November 30, 1971.

Staff is permitted to cross-examine the witness with regard to these matters. Also, it is argued, since the thesis was cited by the witness as the primary evidence of his expertise, a showing that the document was not a piece of original work but was in substantial measure the work of others would detract from his claim of expertise on the subject. Since Mr. Mahran played a critical role in the presentation of Comsat's theory of the case, the Trial Staff contends that admission of the Exhibit into evidence is essential to the presentation of a full and meaningful record, and that the appeal must be considered now rather than by exceptions to the Initial Decision in order to avoid a reopening of the record.

8. We appreciate, of course, that the credibility of a witness is a matter of considerable significance and that delays which result from a reopening due to an error in the ruling of the presiding officer should be avoided to the extent possible. However, we are not persuaded that the question here presented is a fundamental one which is likely to affect the conduct of the entire proceeding (Section 1.301(b) and paragraph 5, *supra*), that there has been shown a flagrant abuse of discretion which would inevitably require a hearing *de novo* (*Communications Satellite Corporation, supra*), or that such other exceptional circumstances have been alleged which meet the stringent requirements we have specified to justify the extraordinary relief of entertaining an appeal from an interlocutory ruling of a presiding officer who has refused to authorize the appeal.

9. Mr. Mahran's qualifications as an expert are not predicated solely upon his authorship of a Master's thesis on the subject of IDC which was presented in 1963. He is a Certified Public Accountant, has engaged in the practice of his profession since 1954, and has been associated as an accountant with public utility firms since 1957. His testimony apparently covered a number of subjects relating to the accounting policies and practices of Comsat in addition to IDC. The witness was subjected to extensive cross-examination over a considerable period of time. At this stage of the proceeding, we do not know what weight will be accorded to his testimony in the resolution of the matters under investigation since no evaluation of such testimony has, as yet, been undertaken in light of all of the evidence of record.

10. Whether Mr. Mahran's conduct in the preparation of his thesis is a controlling or substantial consideration which will affect the outcome of this case is a question which can best be answered when the entire record is reviewed and the conflicting evidence, if any, is weighed and evaluated. By our refusal to entertain the Trial Staff's appeal we run the risk that if the Exhibit is admissible and it is ultimately found that the degree of Mr. Mahran's expertise and his credibility are matters of substantial decisional significance, a reopening will be required. However, the necessity to keep appeals from interlocutory rulings of the presiding officer concerning the admissibility of evidence to an absolute minimum, and our determination that no adequate showing has been made to warrant a waiver, are overriding pub-

lic interest considerations which justify the taking of that risk and require that we refuse to entertain this appeal.

11. Accordingly, IT IS ORDERED, That the petition filed by the Trial Staff on April 23, 1973 for a waiver of the provisions of Section 1.301(b) of the Commission's Rules IS DENIED, and that its petition IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-617

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
DUPAGE COUNTY BROADCASTING, INC., ELMHURST, ILL.	Docket No. 16965 File No. BP-16292
HOWARD L. ENSTROM AND STANLEY G. ENSTROM, D.B.A. CENTRAL DUPAGE COUNTY BROADCASTING CO., WHEATON, ILL.	Docket No. 16966 File No. BP-16465
For Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted June 13, 1973; Released June 26, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING; COMMISSIONER H. REX LEE ABSENT; COMMISSIONER REID CONCURRING AND ISSUING A STATEMENT; COMMISSIONER WILEY CONCURRING IN THE RESULT.

1. Central DuPage County Broadcasting Co. (Central) has petitioned us to reconsider our Decision, 39 FCC 2d 885, released March 1, 1973, in which we granted the mutually exclusive application of Du Page County Broadcasting, Inc. (DuPage). The petition is opposed by DuPage and the Broadcast Bureau (Bureau), and Central has filed a reply to the oppositions.

2. These applications were designated for hearing in a consolidated proceeding by our Memorandum Opinion and Order, 5 FCC 2d 577 (1966). Thereafter, in an Initial Decision, 19 FCC 2d 259 (1968), Administrative Law Jundge Isadore A. Honig propose to grant DuPage's application on Section 307(b) grounds. The Review Board affirmed the Judge in a Decision, 19 FCC 2d 250 (1969). Previously, in a Memorandum Opinion and Order, 16 FCC 2d 899 (1969), the Board had refused to grant a petition filed by Central to reopen the record and enlarge issues. Central filed an application for review of these two actions with us, and in a Memorandum Opinion and Order, 21 FCC 2d 395 (1970), we reversed the later ruling and remanded this proceeding to the presiding Judge for further hearing on issues concerning the operation of Station WCKD, Ishpeming, Michigan, by Frank Blotter,[1] and whether DuPage could reasonably be expected to exercise the proper degree of responsibility expected of a licensee.

3. In regard to the Board's Decision, we stated that Central's application for review did not present any question of law, policy or fact

[1] Frank Blotter is a 51% stockholder in DuPage, as well as its President and proposed general manager of the Elmhurst facility. At the time of the remand proceeding, he was a stockholder and President of Canyon Broadcasters, Inc., then licensee of Station WCKD, and general manager of that station.

109-045—73——8

which warranted review. We also held that we contemplated no relitigation of the issues previously decided, such as the Section 307(b) issue, and that no changes would be made in such determinations except as required by the resolution of the enlarged issues. In our Decision, after completion of the remand hearing, we concluded that Du Page had given adequate assurance of future compliance with our rules, and, therefore, we adopted the Board's Decision, *supra*, as our own and granted DuPage's application.

4. In its petition, Central cites six reasons why reconsideration should be granted: (1) DuPage has presented a series of ungenuine site proposals, its present proposed site being its fifth; (2) past performance is a better indication of future performance than promises; (3) it was improper for Commissioner Reid to participate in the Decision; (4) two of the more senior Commissioners did not participate in the Commission's Decision; (5) the preference granted DuPage under the Section 307(b) issue will not serve the "highest public interest;" and (6) the demonstrated managerial abilities of the Enstroms should be preferred over the managerial ability exhibited by Frank Blotter.

5. Central's points 5 and 6 constitute an attempt to reargue issues that were laid to rest without challenge at that time in our remand order. No new evidence has been presented on those issues which would warrant reconsideration nor does the resolution of the enlarged issues require a change in those determinations. Therefore, we reject these contentions. Similarly, Central's first point raises an issue that is not properly before us. The question of whether DuPage has submitted ungenuine proposals goes to the character of the applicant. On two previous occasions Central has attempted to have such an issue added against DuPage, on both occasions Central's attempts were denied by the Board,[2] and Central never sought review of those actions in a timely manner. Moreover, we note that an issue was added against DuPage to determine the availability and sufficiency of its transmitter site and that this issue was resolved in favor of DuPage by the Judge and affirmed by the Board without further challenge at that time. For the foregoing reasons, we reject Central's first point.

6. We have concluded that Central's second point is based on a misreading of our Decision. A careful reading of paragraphs 24, 27, and 28 of that Decision reveals that we did consider Blotter's overall performance at WCKD and that we determined on that basis that he will be able to manage the proposed broadcast facility responsibly. Central's fourth point is of no legal significance whatever. The determinations contained in our Decision were in no way dependent on the length of time an individual has served as a Commissioner.

7. This brings us to Central's third point which is based on an alleged acquaintanceship which existed between Blotter and Commissioner Reid when they were associated with the radio show *Don McNeil's Breakfast Club* during the 1930s. This allegation is made without any supporting evidence and is based solely on innuendo and conjecture. Also, Central's attempt to implicate Commissioner Reid

---

[2] See *DuPage County Broadcasting, Inc.*, 7 FCC 2d 506 (1967) and 10 FCC 2d 217 (1967).

with Russel G. Salter's efforts on behalf of Blotter in this proceeding [3] is made without any supporting evidence and is based entirely on conjecture. We have total confidence in Commissioner Reid's integrity and believe that, if there was the slightest doubt in her mind that her participation in this proceeding was proper, she would have immediately abstained from further consideration of this case.

8. As the preceding paragraphs demonstrate, Central's petition is totally without merit, since it fails to present any valid reason which would warrant reconsideration of our Decision or any different result in this proceeding. For these reasons, it is clear that Central's petition should be denied without further consideration.

9. Accordingly, IT IS ORDERED, That the petition for reconsideration of our Decision, 39 FCC 2d 885, released March 1, 1973, filed April 2, 1973, by Central DuPage County Broadcasting Co. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

SEPARATE CONCURRING STATEMENT OF COMMISSIONER CHARLOTTE T. REID

(Decision on Petition for Reconsideration in the Elmhurst, Ill., standard broadcast proceeding)

While I concur with the decision of the majority in this case, and while ordinarily there would be no need for me to issue a statement, I have decided to issue this statement because of the allegations made against me personally by Central DuPage County, one of the applicants for a construction permit for a new Class II standard broadcast station on 1530 kHz.

I am grateful to my fellow Commissioners for their vote of confidence in my participation in this matter but want to make certain that there is no question concerning my actions in this proceeding before the Commission.

I voted as I did because in my judgment, after having heard the oral arguments of counsel and having reviewed the record, the evidence clearly reflected that the DuPage application should be granted.

I cannot recall ever having met Mr. Blotter. However, even had we met at some time, this would have had no effect on my decision on the merits of this case.

As to the allegations about my acquaintance with Mr. Salter—I can only say that during my 10 years as a Member of the U.S. House of Representatives it was my practice to return to visit with my constituents frequently. I sent weekly radio tapes to all of the stations in the 15th District and I was interviewed from time-to-time not only by Mr. Salter's station, which happens to be located in my home town of Aurora, Illinois, but also other stations throughout my District. It would, in my judgment, be most unfortunate for this to be turned into a claim of favoritism on my part.

[3] Salter is the licensee of Stations WKKD–AM–FM in Aurora, Illinois, Commissioner Reid's hometown. Central asserts that Salter and Blotter are old friends and, in support of this assertion, attaches as an exhibit to its petition, a letter from Salter to the editor of *The Trib*, an Illinois newspaper, in which Salter champions DuPage's cause.

F.C.C. 73-670

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (HATTIESBURG, MISS., PARKERSBURG, W. VA., TALLAHASSEE, FLA.)	Docket No. 19413 RM-1758, RM-1767, RM-1772

SECOND REPORT AND ORDER

(Adopted June 21, 1973; Released June 25, 1973)

BY THE COMMISSION: COMMISSIONER HOOKS ABSENT.

1. The Commission here considers the Further Notice of Proposed Rule Making in Docket No. 19413, adopted August 29, 1972 (FCC 72-773; 37 Fed. Reg. 18402), and that portion of the Notice of Proposed Rule Making in the same docket, adopted January 26, 1972 (FCC 72-83; 37 Fed. Reg. 2790), pertaining to possible amendment of FM Table of Assignments (Section 73.202(b) of the Commission's Rules and Regulations) to assign a fourth FM channel to Tallahassee, Florida. This action was based on the petition of Capitol City Broadcasting, Incorporated (Capitol City), licensee of AM Station WTAL. Comments were filed by Capitol City and Florida State University (University). The University is the licensee of noncommercial educational Station WFSU-FM, Channel 218, at Tallahassee.

2. Capitol City had proposed the assignment of Channel 276A which could be added without changes elsewhere. Tallahassee, population 71,763, is the capital of Florida and the seat of Leon County, population 102,530.[1] Tallahassee is a Standard Metropolitan Statistical Area (SMSA) consisting of Leon County. Aural broadcast service in Tallahassee consists of 4 AM stations, 2 daytime, 3 Class C FM stations, and noncommercial educational FM Station WFSU-FM.

3. The Further Notice was adopted to more fully canvass the possibility of assigning a channel which would not have the preclusionary effect on assignments elsewhere that Channel 276A would have. The precluded communities included Chattahoochee, population 7,944, Apalachicola, population 3,102, in Florida, two communities of about the same population in Georgia (which subsequent detailed study showed to be already precluded by Station WRBL, Channel 275, Columbus, Georgia), and a number of smaller ones. There were a number of questions about the possibility of assigning Channel 221A. As the Further Notice points out, the alternative of assigning Channel 264C to Tallahassee was deficient.

[1] Unless otherwise indicated, population data are from the 1970 Census.

4. The Further Notice said that assignment of Channel 221A might be a preferable result insofar as preclusion is concerned but that we needed further information as to a possible substitute channel for Station WFSU–FM, Channel 218, that a Channel 221A assignment would require. The University and Capitol City oppose the assignment of Channel 221A. The University's opposition is bottomed on the required change of the channel for Station WFSU–FM (operating at 3 kw ERP and an antenna height of 205 feet) to a lower one [2] which would increase an interference problem between Station WFSU and television Station WCTV, Channel 6, licensed to John H. Phipps Broadcasting Stations, Inc., at Tallahassee, Florida-Thomasville, Georgia. It is Commission policy to severely restrict the use of educational channels where even minimal interference to Channel 6 TV might result.

5. Capitol City also opposes the Channel 221A possibility. With respect to preclusion caused by a Channel 276A assignment, it points out that Channel 285A could be assigned to Chattahoochee, and Channel 221A could be assigned to Apalachicola, and thus the better alternative is to assign Channel 276A to Tallahassee.[3] Capitol City's assertion that 285A could be assigned to Chattahoochee is correct. However, we are not making that assignment here since we normally do not make assignment of channels to communities of less than 10,000 population unless there has been a showing that someone is willing to build a station and no such showing has been made here. The suggested assignment of Channel 221A to Apalachicola is not possible because of the 65-mile adjacent mileage separation required for Station WFSU–FM. In the circumstances, we agree that if a channel assignment is to be made to Tallahassee, Channel 276A is preferable.

6. As to the question of intermixture of channels raised in the Notice and Further Notice, there is no Class C channel available for assignment at Tallahassee, and Capitol City states that it is willing to apply for a Class A channel if assigned. A Class A channel can meet the requirements of our rules as to signal strength. As also pointed out in both the Notice and Further Notice, Tallahassee is the State capital and a center of higher education (two universities and a college with an estimated total student body enrollment of about 24,000 for 1971). In the circumstances, an active interest for a fourth FM channel [4] and the importance of Tallahassee, we find that the public interest, convenience, and necessity would be served by the allocation of Channel 276A to Tallahassee.

---

[2] As pointed out in the Further Notice, Capitol City, or the successful applicant for Channel 221A, if assigned to Tallahassee, would have to reimburse the University for change.

[3] Capitol City makes other arguments as to why it prefers 276A to 221A at Tallahassee. Since not pertinent to our final determination here, we do not discuss them.

[4] Under our population criteria, a city of 50,000 to 100,000 persons is entitled to two to four FM assignments. See Further Notice of Proposed Rule Making, Docket No. 14185, adopted July 25, 1962, and incorporated by reference in para. 25 of the Third Report, Memorandum Opinion and Order, adopted July 23, 1963 (23 R.R. 1859, 1871 (1963)).

7. Authority for the adoption of the amendment contained herein appears in Sections 4(i), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended.

8. In view of the foregoing, IT IS ORDERED, That effective August 6, 1973, Section 73.202(b) of the Commission's Rules and Regulations, the FM Table of Assignments, IS AMENDED for Tallahassee, to read as follows:

City	*Channel No.*
Tallahassee, Fla	235, 255, 276A, 281

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-632

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re GENERAL COMMUNICATIONS & ENTERTAINMENT CO., INC., ALBUQUERQUE, N. MEX. For Certificate of Compliance	CAC-109 NM036

MEMORANDUM OPINION AND ORDER

(Adopted June 13, 1973; Released June 19, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT; COMMISSIONER REID CONCURRING IN THE RESULT.

1. On April 3, 1972, General Communications and Entertainment Company, Inc., applied for a certificate of compliance to begin cable television service at Albuquerque, New Mexico, a major television market (#81). The application has been opposed by Spanish International Communications Corp., licensee of Station KMEX-TV, Los Angeles, California.[1]

2. General Communications and Entertainment proposes to commence service with the following television signals:

KOB-TV (NBC) Albuquerque, N. Mex.
KOAT-TV (ABC) Albuquerque, N. Mex.
KGGM-TV (CBS) Albuquerque, N. Mex.
KNME-TV (Educ.) Albuquerque, N. Mex.
KTLA (Ind.) Los Angeles, Calif.
KTTV (Ind.) Los Angeles, Calif.
XEPM-TV (Ind.—Spanish Language) Juarez, Mexico.

3. Spanish International Communications Corp., the licensee of Station KMEX-TV, a Los Angeles Spanish language station, objects to the carriage of XEPM-TV. Spanish International asks the Commission to prohibit carriage of Mexican signals in cases where domestic Spanish-language programming is available to the cable operator either off-the-air or via microwave. In the present case, Spanish International asserts, the applicant proposes the carriage of two Los Angeles signals via common carrier microwave facilities and, consequently, a Los Angeles Spanish language signal is "available" and should be carried instead of a Mexican station.

4. The Commission denied similar objections raised by Spanish International Communications in *Mickelson Media, Inc.*, FCC 73-119, 39 FCC 2d 602. There, Spanish International objected to the proposed

[1] The application was also opposed by Hubbard Broadcasting, Inc., licensee of Station KOB-TV and by KOAT-TV, Inc., licensee of KOAT-TV, both in Albuquerque, New Mexico; however, these objections were withdrawn on October 4, 1972.

carriage of XEPM–TV by a cable television system operating at Las Vegas, New Mexico, which also proposed to carry two Los Angeles signals. The Commission held that KMEX–TV is not a local station in the community of the cable system and has no "right" to carriage. Furthermore, the Commission stated that Spanish International made no showing that it would be harmed by the proposed signal carriage and did not meet its "substantial burden" in attempting to prevent signal carriage consistent with the Commission's rules.

5. The facts in the present case are quite similar to those in *Mickelson Media Inc., supra.* Albuquerque is approximately 680 miles from Los Angeles but 240 miles from Juarez, Mexico; thus, KMEX is not a local station in Albuquerque. Second, Spanish International has not shown that it will be harmed by the granting of the present application. Spanish International has made no compelling demonstration for a waiver of our policy as it applies to the present application; therefore, we deny the objection. *See* Para. 23, *Reconsideration of Cable Television Report*, 36 FCC 2d 326, 335 (1972); Para. 96, *Cable Television Report and Order*, 36 FCC 2d 143, 180 (1972).[2]

6. On February 19, 1968, the City of Albuquerque enacted an ordinance providing for the issuance of a cable television franchise and setting forth the terms and conditions under which the franchisee would operate. Pursuant to the ordinance, on June 10, 1968, the City awarded a franchise to General Communications and Entertainment Company. The grant was appealed by Hubbard Broadcasting, Inc., and on March 16, 1970, while the appeal was pending, the City enacted an ordinance granting General Communications and Entertainment a non-exclusive right to construct and operate a cable television system in Albuquerque. The 1968 and 1970 ordinances were declared void by lower courts, but the New Mexico Supreme Court reversed both lower court decisions on the ground that the plaintiff had no standing. *Hubbard Broadcasting, Inc.* v. *City of Albuquerque*, 82 N.M. 164, 477 P. 2d 602 (1970).

7. The Attorney General of New Mexico, in an opinion dated June 26, 1972, stated that cities in New Mexico had no authority to issue cable television franchises prior to a "home-rule" amendment to the State Constitution on November 3, 1970, and that, consequently, the 1968 ordinance and franchise are invalid. The Attorney General also stated that the 1970 ordinance is essentially the same as the prior ordinances and, therefore, also invalid. However, the 1970 ordinance grants only a non-exclusive permit, whereas the 1968 ordinance grants an exclusive franchise. The 1970 ordinance is quite similar to an ordinance enacted by the City of Sante Fe, New Mexico, in April, 1970, which was upheld by a New Mexico District Court. *Hubbard Broadcasting, Inc.* v. *City of Santa Fe*, No. 40054 (Dist. Ct. Santa Fe County, N.M., Aug. 18, 1970). In that case, the Court held that the City of Santa Fe, even prior to the "home-rule" amendment, had the power to issue a non-exclusive permit to construct and operate a cable television system based on its authority to regulate use of the city

[2] Spanish International's request that we consolidate for joint consideration all applications for certificates of compliance which involve importation of Mexican signals was denied in *Mickelson Media, Inc.*, FCC 73–119, 39 FCC 2d 602, 603 n. 2.

streets and sidewalks in accordance with the health, safety and welfare of the city residents. General Communications and Entertainment relies on the March 16, 1970 ordinance (No. 41–1970) for purposes of Commission certification. Although we make no judgment whether the ordinance is valid under New Mexico law, we do note that there is a presumption of validity of official acts of municipalities (*e.g., City of Lovington* v. *Hall*, 68 N.M. 143, 359 P. 2d 769 (1961)) and that there is no judicial stay in effect regarding the ordinance. The New Mexico Supreme Court, in reversing the lower court decisions holding the 1968 and 1970 ordinances invalid, ordered the complaint dismissed with prejudice; thus there is no judicial determination on the merits of the case. *Hubbard Broadcasting, Inc.* v. *City of Albuquerque, supra.* In addition, the City Attorney of Albuquerque, in a letter filed in support of the present application,[3] indicates he is of the opinion that General Communications and Entertainment holds a valid authorization to operate a cable television system in the city.[4] Under these circumstances, we find that, for purposes of Commission certification, General Communications and Entertainment holds a "franchise or other appropriate authorization" within the meaning of Section 76.31 of the Commission's rules. *See Aberdeen Cable TV Service, Inc.*, 20 FCC 2d 475 (1969), *reconsideration denied*, 22 FCC 2d 239 (1970). However, the certificate of compliance we grant herein is conditioned upon the continuing validity of the 1970 ordinance (No. 41–1970); if the ordinance is declared invalid by the New Mexico Supreme Court, or if the New Mexico Supreme Court affirms such declaration of a lower court, the certificate of compliance will terminate.

8. The 1970 ordinance was amended by the City of Albuquerque in July, 1972. As amended, the authorization is substantially consistent with Section 76.31 of the rules. *See* "Note" to Section 76.13(b)(3) of the rules; *CATV of Rockford, Inc.*, 38 FCC 2d 10 (1972) *reconsideration denied*, FCC 73–293, 40 FCC 2d 493.

In view of the foregoing, the Commission finds that a grant of the above-captioned application is consistent with the public interest.

Accordingly, IT IS ORDERED, That the above-captioned application for certificate of compliance filed by General Communications and Entertainment Company, Inc., IS GRANTED and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the "Opposition to Application for Certification" filed May 5, 1972, by Spanish International Communications Corp., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

---

[3] The Assistant Attorney General of New Mexico, in a letter to the City Attorney of Albuquerque dated February 13, 1973, stated that the Opinion of the Attorney General of June 26, 1972, "is not necessarily binding and controlling upon the actions of municipalities or persons dealing with them."

[4] On July 10, 1972, the City of Albuquerque enacted a further ordinance (No. 150–1972) which, while prescribing the procedures for issuing future franchises, "ratified and confirmed" the "franchises, licenses, permits, privileges or rights" granted pursuant to the 1968 and 1970 ordinances.

F.C.C. 73R-232

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ERWIN GLADDENBECK, SHELL LAKE, WIS.	Docket No. 19211 File No. BPH-7192
CHARLES R. LUTZ, SHELL LAKE, WIS. For Construction Permits	Docket No. 19212 File No. BPH-7262

MEMORANDUM OPINION AND ORDER

(Adopted June 19, 1973; Released June 22, 1973)

BY THE REVIEW BOARD.

1. The Review Board has before it a motion to enlarge issues in the above captioned proceeding, filed April 5, 1973, by the Broadcast Bureau.[1] The Review Board, in a Decision, FCC 73R-74, released February 14, 1973, 39 FCC 2d 525, —— RR 2d ——, denied the application of Charles R. Lutz and granted the mutually exclusive application of Erwin Gladdenbeck. Lutz filed on March 16, 1973, a petition to reconsider the Review Board's Decision. That petition was denied by the Review Board by Memorandum Opinion and Order, FCC 73R-158, released April 18, 1973. However prior to the Review Board's issuance of its Memorandum Opinion and Order denying the petition for reconsideration, the Broadcast Bureau filed its motion to enlarge requesting an issue:

> "To determine whether Charles R. Lutz has solicited or encouraged others to make an *ex parte* presentation in violation of Sections 1.1221 and 1.1225 of the Commission's Rules and, if so, the effect thereof on the applicant's requisite or comparative qualifications."

The Bureau's petition is predicated on a letter, dated February 5, 1973, Lutz sent to a Wisconsin Congressman and its two Senators concerning his case. Lutz, in response, contends that the Bureau's petition was not timely filed, and that his letter to the Wisconsin legislators was not sufficiently specific to be in violation of the Commission's *ex parte* Rules.

2. The Bureau's motion will be dismissed. For, while we agree that the Bureau was justified in waiting until Lutz filed his petition to reconsider before filing its motion to enlarge, we, by the same token, are convinced that in view of our disposition of the petition to reconsider no useful purpose would be served by considering the motion to

[1] The Board also has before it an Opposition, filed by Charles R. Lutz on April 16, 1973 and the Bureau's reply, filed April 28, 1973.

enlarge at this stage of the proceeding. This does not preclude the Bureau from refiling its motion should the matter of Lutz's qualifications to be a licensee again become pertinent.

3. Accordingly, IT IS ORDERED, That the motion to enlarge issues, filed April 5, 1973, by the Broadcast Bureau IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN W. WAPLE, *Secretary.*

41 F.C.C. 2d

F.C.C. 73R-190

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of PHIL D. JACKSON, EUREKA, CALIF.	Docket No. 19294 File No. BP-18196
CARROLL H. HAUSER, EUREKA, CALIF. For Construction Permits	Docket No. 19296 File No. BP-18463

ORDER

(Adopted May 16, 1973; Released May 17, 1973)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. The Review Board having under consideration (a) the Initial Decision of Administrative Law Judge Basil P. Cooper (FCC 72D-40, released June 21, 1972) proposing to grant the application of Carroll H. Hauser, and the exceptions filed with respect thereto; (b) the petition to dismiss application, filed on May 1, 1973, by Phil D. Jackson; and (c) other matters of record herein;

2. IT APPEARING, That, after due consideration of the exceptions with respect to Hauser, a grant of the petition to dismiss application of Phil D. Jackson and a grant of the application of Carroll H. Hauser would serve the public interest, convenience and necessity;

3. IT IS ORDERED, That the petition to dismiss application filed on May 1, 1973, by Phil D. Jackson, IS GRANTED and his application IS DISMISSED;

4. IT IS FURTHER ORDERED, That the exceptions filed on July 20, 1972, by the Broadcast Bureau and on July 21, 1972, by Phil D. Jackson with respect to Hansen ARE DISMISSED as moot; and

5. IT IS FURTHER ORDERED, That the application of Carroll H. Hauser (File No. BP-18463) IS GRANTED, subject to the following conditions:

Permittee shall submit with the application for license, antenna resistance measurements made in accordance with Section 73.54 of the Commission's Rules.

Before program tests are authorized permittee shall submit a proof of performance to establish that the proposed non-directional radiation pattern is not adversely affected by reradiation from man-made structures.

Prior to requesting program test authority, Hauser will honor his commitment to the Commission to sell without recourse to him the note he presently holds which is secured by a deed trust and a chattel mortgage on the facilities of Station KINS (formerly KHUM), Eureka, California.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

F.C.C. 73-643

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF J. B. BROADCASTING OF AUGUSTA, LTD., LICENSEE OF STATION WRDW, AUGUSTA, GA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted June 13, 1973; Released June 19, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT; COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. The Commission has under consideration (1) its Notice of Apparent Liability dated October 5, 1972, addressed to J. B. Broadcasting of Augusta, Ltd., Licensee of Station WRDW, Augusta, Georgia, and (2) the licensee's response to the Notice of Apparent Liability dated October 18, 1972.

2. The Notice of Apparent Liability was issued pursuant to Section 503(b)(1)(B) of the Communications Act of 1934, as amended, and subjected the licensee to an apparent forfeiture liability in the amount of five hundred dollars ($500) for willful or repeated failure to observe the provisions of Sections 73.111 and 73.112 of the Commission's Rules pertaining to the keeping of program logs.

3. In response to the Notice of Apparent Liability, the licensee states in part:

> It is clear that we have erred in our operations of Station WRDW as your recent field inquiry has documented. However, the thrust of our error is in the novelty of Blacks owning and operating a broadcast facility in the deep South and not a "willful or repeated failure to observe the Commission's Rules."
>
> We respectfully point out that the provision of the Communications Act of 1934, as amended, which authorizes the Commission to impose forfeitures on licensees are of comparatively recent vintage. Prior to that time, nearly one-half century of commercial broadcasting excluded Blacks from both ownership and/or meaningful management-operation. During that half century, many errors were made by broadcasters without the stigma of "forfeiture." In time, with experience, both the owners and operators, as well as their employees learned to follow the "Rules." We submit that the errors we are accused of are errors that experience will correct. When our Black staff, Black management, and Black owner is allotted nominal time—all will be right—and in operation in the Public interest.
>
> We do not believe that the error we are accused of under the circumstances is sufficient to impose a "forfeiture" upon us, but would agree that we have much to learn and much to perfect before we become model broadcasters. We shall endeavor to achieve the latter as soon as possible.

4. With respect to the violations listed in Appendix B of the Notice (commercial announcements logged as public service announcements and sponsor's names omitted from logs), the licensee does not deny that

the sponsor's name was omitted, but states that the announcements were unsponsored public service announcements and not commercials. The Commission obtained additional information which indicates there is no basis for the two violations listed in Appendix B of the Notice.

5. With respect to the violations listed in Appendix D of the Notice (commercial announcements for which the actual duration of the announcement was at variance with the logged duration of the announcement), the licensee states that although the entries on the program logs for the "Sprite" announcements on October 13 and 14, 1971 were incorrect, the commercials supplied by the advertising agency were 30 seconds in length, and that the sponsor was billed for 30 second announcements. The licensee states that the sponsor had ordered 30 second announcements but 60 second announcements were logged due to a clerical error. The licensee states that this error in the order was observed and corrected shortly thereafter. Although the licensee's explanation for "Sprite" announcements seems credible, it does not deny the violations listed in Appendix D regarding the March 24 and 27 announcements, which ran substantially longer than shown in the logs.

6. Regarding the violations listed in Appendix E of the Notice (Public Service Announcements broadcast but not entered on the program log), the licensee states:

> "What's Happening Now!" was a program 30 sec. in length for church, civic clubs and community group announcements. It was considered to be a news type program, and was replaced by Community News with Tina Sims, which is the same program . . . now logged as News."

Although the licensee did not comment on its failure to log the Luther Laney Booster Club announcement contained in Appendix E of the Notice, from other information before the Commission, it appears those announcements were PSA's under the definition of the Commission's Rules.

7. The licensee does not deny the violations listed in Appendix A (programs entered on program log but not broadcast, and no correction made on log) and Appendix C (programs broadcast but not entered on the program log).

8. We cannot agree with that part of the licensee's response which asserts that it should be relieved of liability because of its black ownership and the fact that blacks only recently acquired ownership and management of broadcasting stations and lack experience in this field. The same contention could be made for any permittee or licensee who had entered broadcasting only recently. The Commission has always held that it is the responsibility of a permittee or licensee to familiarize himself and comply with the applicable statutes and Commission rules and policies, regardless of the length of time in which he has been engaged in broadcasting. For example, in *Stereophonic Alaska, Inc.*, 20 FCC 2d 556 (1969) we denied an application for mitigation based in part on the licensee's lack of experience as a station operator. Many other forfeitures have been imposed despite pleas in mitigation or remission based on the licensee's lack of knowledge of the law or the inexperience of the employee responsible for the violation. See *Fay Neel Eggleston*, 19 FCC 2d 829 (1969) re licensee's lack of knowledge of

the rules and *Gaffney Broadcasting, Inc.*, 23 FCC 2d 912 (1970) re licensee's responsibility for the acts of its employees. Moreover, the licensee in the present case does not appear to lack experience in the operation of broadcasting stations. Mr. James Brown, president and principal owner of WRDW, acquired the station by assignment granted February 12, 1969. He also is the principal owner and an official of stations WJBE, Knoxville, Tennessee, which he acquired by assignment granted December 27, 1967, and WEBB, Baltimore, Maryland, assignment of which was granted on December 3, 1969.

As we stated in affirming the first broadcast forfeiture action initiated after Congress authorized broadcast forfeitures by amendment of the Act in 1960:

> We intend to use the forfeiture proceeding, as we believe it was intended to be used, to impel broadcast licensees to become familiar with the terms of their licenses and the applicable Rules, and to adopt procedures, including periodic review of operations, which will insure that stations will be operated in substantial compliance with their licenses and the Commission's Rules. *Crowell-Collier Broadcasting Corp.*, FCC 61–989, 21 RR 921 (1961).

Since the Crowell-Collier case, we have imposed more than one thousand additional forfeitures to the same end.

9. Although we are not persuaded to rescind the forfeiture in the present case, the licensee's response and information obtained elsewhere by the Commission indicates that as stated above, some of the apparent violations did not take place, and we note that although at least some of the violations cited in Appendix E to the Notice of Apparent Liability occurred, they were, in fact, to the disadvantage of the licensee since they consisted in omitting from the program log some public service announcements that were broadcast. Accordingly, we have determined to reduce the amount of the forfeiture proposed in the Notice from $500 to $300.

10. In view of the foregoing, IT IS ORDERED, That J. B. Broadcasting of Augusta Ltd., FORFEIT to the United States the sum of three hundred dollars ($300) for repeated failure to observe the provisions of Sections 73.111 and 73.112 of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

11. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail-Return Receipt Requested to J. B. Broadcasting of Augusta, Ltd., licensee of Radio Station WRDW, Augusta, Georgia.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-230

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
KEY BROADCASTING CORP., LEXINGTON PARK, MD.	Docket No. 19410 File No. BPH-6540
SOUND MEDIA, INC., LEONARDTOWN, MD.	Docket No. 19411
For Construction Permits	File No. BPH-6886

MEMORANDUM OPINION AND ORDER

(Adopted June 18, 1973; Released June 21, 1973)

BY THE REVIEW BOARD.

1. This proceeding, involving the mutually exclusive applications of Key Broadcasting Corporation (Key) and Sound Media, Inc. (Sound) for a new FM broadcast station in Lexington Park and Leonardtown, Maryland, respectively, was designated for hearing on various issues, including a limited financial issue against Sound, by Commission Order, FCC 72-78, released February 1, 1972. On January 24, 1973, Sound filed a petition for leave to amend its application in order to reflect the fact that it had filed an application for nighttime facilities for its standard broadcast station WKIK, Leonardtown, Maryland.[1] Now before the Review Board is a petition for enlargement of issues, filed February 2, 1973, by the Broadcast Bureau seeking expansion of the financial issue specified against Sound.[2]

2. The Bureau contends that Sound's January 24 amendment reflects that it is relying on the same funds twice, once in the instant FM application, and again for the newly filed nighttime AM application, and that, in view of the fact that Sound needs approximately $23,000 to finance the FM proposal and $27,000 for the AM proposal, and resources are shown of only about $42,000, a substantial question is raised regarding Sound's financial ability to construct the facilities. Sound, in opposition, relies on proposed amendments to both its applications, filed simultaneously with its opposition, and contends that the amendments clarify matters raised in the Bureau's petition and leave no doubt of its financial ability to construct and operate both proposals.[3]

---

[1] This amendment was accepted by Order of the Administrative Law Judge, FCC 73M-169, released February 6, 1973.

[2] Also before the Board are: (a) an opposition, filed February 22, 1973, by Sound; (b) a reply to the opposition, filed February 28, 1973, by Key; and (c) a reply to the opposition, filed March 1, 1973, by the Bureau. As a pleading which is not permitted by Section 1.45 of the Rules, Key's reply to Sound's opposition will not be accepted or considered by the Board.

[3] Before Sound's petition to amend, filed February 22, 1973, and its supplement to this petition, filed March 9, 1973, were ruled upon, Sound requested the Presiding Judge to dismiss both, stating that it intended to file a completely new petition for leave to amend which would affect its financial proposal in the instant proceeding. This request was granted by the Presiding Judge's Order, 73M-421, released April 5, 1973.

3. On April 5, 1973, Sound filed a new petition for leave to amend its application which sets forth a completely new financial proposal. This amendment, and one filed May 4, 1973, were accepted by Order of the Administrative Law Judge, FCC 73M–610, released May 22, 1973. The allegations contained in the Bureau's petition are based on Sound's January 24, 1973 financial proposal. As indicated above, this proposal has been substantially changed by Sound's recent amendments. Because the Bureau's petition has been effectively mooted by these amendments, no useful purpose would be served by ruling on the merits of the petition, and, therefore, the petition will be dismissed. If, in the Bureau's or Key's judgment, the amendments do not establish Sound's financial qualifications, such dismissal would not bar either from filing an appropriate petition seeking the addition of financial qualifications issues. *WRBN, Inc.*, 10 FCC 2d 488, 11 RR 2d 427 (1967).

4. Accordingly, IT IS ORDERED that the petition for enlargement of issues, filed February 2, 1973, by the Broadcast Bureau, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

41 F.C.C. 2d

109-045—73——9

F.C.C. 73-618

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
MEREDITH COLON JOHNSTON (WECP), CARTHAGE, MISS.	Docket No. 18487 File No. BP-17449
AARON L. FORD AND GERTRUDE C. FORD, D.B.A. FORD BROADCASTING CO., JACKSON, MISS.	Docket No. 18488 File No. BP-17752
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted June 13, 1973; Released June 19, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT; COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. Ford Broadcasting Company has filed with us a petition for reconsideration [1] of our Decision, 39 FCC 2d 782, released February 21, 1973.

2. In our Decision, we denied Ford's application for a construction permit for a new broadcast facility, granted the application for a construction permit to change power and frequency filed by Johnston, and adopted the Review Board's Decision in this matter, 33 FCC 2d 324 (1972), as our own. In its petition, Ford places emphasis on two alleged errors in the Decision: (1) the failure to accord substantial weight to the fact that an FM channel is allocated to Carthage which could be used to serve the needs of Johnston's proposed service area and which was allocated at Johnston's request; and (2) the failure to give adequate consideration to the record evidence indicating that Johnston was deficient in his efforts to ascertain the needs and interests of the black community and in his programming to meet such needs and interests.

3. Ford presented essentially the same arguments in its application for review of the Review Board's decision and in its oral argument before the Commission. We gave careful consideration to these arguments and to the troublesome questions raised by them in the preparation of our Decision. As we noted therein (par. 2): "This has been a strenuously contested proceeding, and the record in replete with conflicting evidence on each of the contested issues." Nevertheless, we were persuaded by our review of the case that the Board's findings and conclusions adequately and properly reflect the record, that no error of law had been committed and that its ultimate disposition was correct.

---

[1] Also before us are oppositions to the petition for reconsideration filed by the Broadcast Bureau and Meredith Colon Johnston, and a separate reply to each opposition filed by Ford.

Ford has presented no argument which would cause us to depart from these views and we adhere to them. However, we shall elaborate on certain of our holdings to demonstrate more fully the inapplicability of Ford's contentions to this case.

4. Considering first the challenge to the sufficiency of Johnston's ascertainment efforts and the adequacy of the programming proposed by the applicant, it is apparent that Ford's contentions result from a misconception of the nature of the case under consideration. This is not a renewal proceeding and Johnston's ascertainment efforts and past programming with respect to his *existing service area* are not at issue here. Johnston has been operating WECP since 1966 and this proceeding involves no challenge to the continued operation of the station by the licensee. In this case, the critical issue (Issue 3) relates to Johnston's efforts to ascertain the needs and interests "of the area to be served"; that is, the proposed *gain area*. As both the Examiner (33 FCC 2d at 372–375) and the Review Board (33 FCC 2d at 328–329) emphasized, the consultation requirements for a *gain area* are neither as extensive nor as stringent as those for the community of license; and the resolution of the issue in favor of Johnston was made in light of the standards applicable to a gain area.

5. We find that Commission policy was correctly applied in this case and that the evidence of record supports the conclusions reached by the Board and the Examiner. See also *Lakewood Broadcasting Service, Inc.* (KLAK–FM), FCC 73–154, released February 13, 1973, where the Commission held that only community leaders, not members of the general public, need be interviewed in gain areas outside the community of license. Insofar as past programming is relevant to the means by which Johnston proposes to meet the needs and interests of the gain area, the pertinent evidence was discussed in detail by the Review Board (33 FCC 2d at 329) and the Examiner (33 FCC 2d at 356–359) and no useful purpose would be served by repeating these discussions here. Suffice it to say that the evidence of record amply supports their findings and conclusions.

6. Ford's further contention that Johnston's application should be denied because of the availability of an FM channel in Carthage was rejected by the Board on the ground that it is "existing facilities that must be considered and not allocated channels or pending applications." Ford again urges, as it has throughout this proceeding, that the failure to give substantial weight to this FM allocation is inconsistent with Commission precedent and policy which seeks to promote FM development so that AM and FM will become integral parts of a total aural service. In support of this contention, the petitioner cites a number of rule-making and adjudicatory proceedings but they are irrelevant to the question of whether, under the rules and precedents then controlling, the Board erred in refusing to give controlling significance to an allocated but unoccupied FM channel. While we agree with Ford's statement concerning the general policy objectives of the Commission to make FM and AM integral parts of a total aural service, the fact remains that in the adjudicatory cases cited by the petitioner, the Section 307(b) determination was based on existing operations,

not merely allocated channels. We find that the Board correctly applied Commission precedent to the facts of this case.

7. Again advanced in its petition for reconsideration is Ford's claim that a denial of Johnston's application is required because the latter represented in a petition for allocation of an FM channel to Carthage that he intended to apply for the station but failed to do so. We find no basis for this claim, particularly in view of the sequence of events which occurred here. Johnston filed his application for a change of his existing facilities on September 22, 1966. The Ford application was filed on May 11, 1967 and was thereafter amended a number of times, the last amendment being filed on August 14, 1968. On January 22, 1969, while the competing applications were still on the processing line, Johnston filed the petition for rulemaking to allocate an FM channel to Carthage to which Ford has reference. Thereafter, on March 21, 1969, an order was released designating the competing applications for hearing and Johnston's petition for the FM allocation was not granted (RM–1396) until June 25, 1969, approximately three months after the release of the designation order. If Ford had reason to believe that Johnston's continued prosecution of his AM application, and failure to file an application for the FM allocation, constituted a misrepresentation rather than a change of mind due to changed circumstances, it was incumbent on the applicant to seek an enlargement of issues so that the matter could be explored fully at the hearing. Having failed to do so, Ford is hardly in a position to complain that a grant of Johnston's application is precluded by reason of an alleged misrepresentation.

8. Finally, Ford attempts to interject new matters by its assertion that a grant of Johnston's application is precluded by a rule adopted in our Report and Order in Docket No. 18651, released February 28, 1973, a week after we released our Decision in this case. *Broadcast Station Assignment Standards*, 39 FCC 2d 645. In that Report and Order, we promulgated a new rule which requires an applicant for a change in the authorized frequency of an existing daytime only station, such as Johnston's station WECP, to show that "no FM channel is available for use in the community designated in the application. . . ." before its application will be accepted.[2] Adoption of this rule has no effect on the posture of this case. First, the new rule did not become effective until April 10, 1973, some seven weeks after the release of our final decision in this long-pending comparative proceeding and no such outstanding public interest considerations have been advanced which would warrant such an extreme retroactive application. Moreover, the note to Section 1.571 of the Rules explicitly states that the above quoted provision is applicable only to applications filed after July 18, 1968. Therefore, Johnston's application would be exempt from the effect of the new rules even had they been in effect when this proceeding was designated for hearing because his application was filed September 22, 1966. Thus, the Board's holding on this point was the proper application of the then pertinent policy applicable to this case.

[2] See 39 FCC 2d at 668. See also, Section 73.37(e)(1)(ii) of our Rules, 39 FCC 2d at 681.

9. In addition to the point discussed above, Ford lists, but does not elaborate upon, other alleged errors in the Decision. In our view, these contentions were properly rejected by the Review Board for the reasons stated in its Decision and no further discussion of them is necessary.

10. Accordingly, IT IS ORDERED, That the petition for reconsideration of our Decision, 39 FCC 2d 782, filed March 23, 1973 by Ford Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-660

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART 0 OF THE COMMISSION'S RULES TO ESTABLISH THE OFFICE OF PLANS AND POLICY

ORDER

(Adopted June 21, 1973; Released June 25, 1973)

BY THE COMMISSION: COMMISSIONER HOOKS ABSENT.

The purpose of this Order is to establish the Office of Plans and Policy; to assign it specific functions and responsibilities; and, to formalize its organizational setting and structure.

Accordingly, Part 0 of the Commission's Rules is amended to reflect this change. Authority for the attached amendment is contained in sections 4(i), 5(b), and 303(r) of the Communications Act of 1934, as amended. Because the amendment relates to internal Commission organization, the prior notice and effective date provisions of section 4 of the Administrative Procedures Act (5 U.S.C. 553) do not apply.

In view of the foregoing, IT IS ORDERED, That, effective July 6, 1973, Part 0 of the Rules and Regulations is amended as set forth in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Part 0 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

[Section 0.5(a) (4)-(11) and Section 0.5(b) (3) and (4) redesignated]

1. Section 0.5 is amended as follows:

a. In paragraph (a), a new subparagraph (4) is added, to read as follows, and present subparagraphs (4) through (11) are redesignated (5) through (12), respectively.

b. In paragraph (b), a new subparagraph (3) is added, to read as follows, and present subparagraphs (3) and (4) are redesignated (4) and (5), respectively.

§ 0.5 General description of Commission organization and operations.

(a) * * *

(4) Office of Plans and Policy

* * * * * * *

(b) * * *

(3) *The Chief of Plans and Policy.* The Chief of Plans and Policy is designated by the Commission as a staff officer directly responsible to the Commis-

sion under the supervision of the Chairman. His principal role is to advise, assist, and make recommendations to the Commission with respect to the development and implementation of communications policies in all areas of Commission authority and responsibility. He is also responsible for coordinating policy research and development activities within the Commission, and with other governmental agencies.

* * * * * * *

2. An undesignated center heading and new § 0.21 are added to read as follows:

OFFICE OF PLANS AND POLICY

§ 0.21 Functions of the Office

The Office of Plans and Policy, as a staff office to the Commission, assists, advises and makes recommendations to the Commission with respect to the development and implementation of communications policies in all areas of Commission authority and responsibility. A principal function of the Office is to conduct independent policy analyses to assess the long-term effects of alternative Commission policies on domestic and international communication industries and services, with due consideration of the responsibilities and programs of other staff units, and to recommend appropriate Commission action. The Office is also responsible for coordinating the policy research and development activities of other staff units, with special concern for matters which transcend their individual areas of responsibility. The Office is composed of legal, engineering, economic, and sociological policy analysts and other personnel, and is headed by a chief having the following duties and responsibilities:

(a) To identify and define significant communications policy issues in all areas of Commission interest and responsibility;

(b) To conduct technical, economic, and sociological impact studies of existing and proposed communications policies and operations, including cooperative studies with other staff units and consultant and contract efforts as appropriate;

(c) To develop and evaluate alternative policy options and approaches for consideration by the Commission;

(d) To review and comment on all significant actions proposed to be taken by the Commission in terms of their overall policy implications;

(e) To recommend and evaluate governmental (state and federal), academic, and industry sponsored research affecting Commission policy issues;

(f) To prepare briefings, position papers, proposed Commission actions, or other agenda items as appropriate;

(g) To manage the Commission's policy research program, recommend budget levels and priorities for this program, and serve as central account manager for all contractual policy research studies funded by the Commission;

(h) To coordinate the development and presentation of Commission views and position papers regarding both domestic and international communication policy, and to participate in inter-agency and international discussions and conferences, as may be authorized and approved by the Commission;

(i) To develop and recommend procedures and plans for the effective handling of policy issues within the Commission.

F.C.C. 73-657

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CONSIDERATION OF THE OPERATION OF, AND POSSIBLE CHANGES IN, THE "PRIME TIME ACCESS RULE," SECTION 73.658(k) OF THE COMMISSION'S RULES	Docket No. 19622
Petitions of NATIONAL BROADCASTING CO., INC. (NBC)	RM–1967
MIDLAND TELEVISION CORP. (KMTC, SPRINGFIELD, MO.)	RM–1935
KINGSTIP COMMUNICATIONS, INC. (KHFI–TV, AUSTIN, TEX.) For Deletion of the Rule	RM–1940
MCA, INC. To Permit Use of "Off-Network" Material Plus 25 Percent New Material	RM–1929

NOTICE OF ORAL ARGUMENT

(Adopted June 15, 1973; Released June 18, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT.

1. Notice is hereby given of oral argument to be held in the above-captioned proceeding, on *Monday and Tuesday, July 30 and 31, 1973*, at the Commission's offices in Washington, D.C. (Room 856, at 1919 M Street, N.W.) beginning at 9:30 A.M. (DST) Parties wishing to appear and participate shall notify in writing the Chief, Office of Network Study, by *Friday July 6, 1973*, setting forth the amount of time which they request. A schedule of oral argument will be issued later, after review of these requests.

2. While the record in this proceeding contains enough material so that a decision could possibly be issued on the basis of it, the Commission believes that in certain areas additional information and argument would be helpful. Also, in recent weeks there have been a number of late-filed comments and informal submissions, and it is believed that such parties, and parties who may wish to reply to such submissions, should be heard in a formal proceeding.[1] It is not anticipated that the holding of such oral argument will delay decision herein beyond September 1973. Meanwhile, probably before the end of June, we will

[1] Comments and letters filed since June 1 by Viacom International, Inc., ABC, MGM Television, National Committee of Independent Television Producers, and Worldvision Enterprises, Inc., are being placed in the docket in this proceeding.

issue decisions concerning various pending matters relating to the 1973–74 broadcast year ("off-network" waiver requests, sports waivers, etc.).

3. The Commission is not specifying the subjects to which discussion is to be limited. We call attention to two areas which we hope will be covered. The first of these is the "impact on U.S. program production activity and employment" which has been asserted vigorously as reason why the rule should be repealed, and vigorously disputed by proponents of the rule. Comments are invited as to what extent this is a consideration relevant to our evaluation of the rule, and, to the extent it may be, what the facts are as to the loss in network program production activity (and resulting employment), and as to the gain in such activity and employment from the production of the first-run syndicated and local material which has replaced network programs during the "access period". The second area is information as to the number and types of syndicated and local programs (U.S.-produced or foreign) which are likely to be shown on stations during the "access period" in 1973–74, and in the future to the extent that is predictable. We also emphasize that the Commission in its decision herein is free to consider, and parties may wish to discuss, a wide range of alternatives, from leaving the rule essentially *as is* with minor changes, to repeal, and of course including various "in-between" approaches.

4. All interested parties, whether or not they have previously participated in this matter, will be heard to the extent that time permits. In order to conserve time, parties with generally the same interest or position, such as the various film producers who have vigorously urged repeal of the rule, are urged to consolidate their presentations. Also, since this is in large part an effort to gather information, we hope that parties themselves, as well as attorneys, will participate or at least be available to respond to questions which may arise. Besides parties with a financial interest in the decision herein, we hope that others knowledgeable as to the matters involved, such as economists, will participate. Furthermore, while of course it may not be possible to accommodate all viewers who might wish to be heard, we hope there will be at least some presentation of the viewpoint of the "ordinary viewer".

5. Parties wishing to participate in the oral argument, and others, may file written material with the Commission by *Friday, July 13, 1973* (an original and 14 copies). However, while such material will be entertained and considered, its filing is not encouraged, except as to the areas mentioned in paragraph 3. In particular, parties who have already filed material herein are urged not to repeat it but simply to refer to it in whatever material they submit at this time.

6. If it appears that pertinent material would be developed, the Commission reserves the right to recall, on Wednesday, August 1, if possible, otherwise on a date very shortly thereafter, participants in the oral argument for further discussion.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-231

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of PROSSER-GRANDVIEW BROADCASTERS, INC., GRANDVIEW, WASH.	Docket No. 19655 File No. BPH-7762
BENNETT BROADCASTING CO., SUNNYSIDE, WASH.	Docket No. 19656 File No. BPH-7860
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted June 18, 1973; Released June 22, 1973)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER CONCURRING IN THE RESULT.

1. By Memorandum Opinion and Order, FCC 73M-349, released March 16, 1973, the Administrative Law Judge in this proceeding, in response to a joint request filed by the applicants pursuant to Section 1.525 of the Rules, dismissed the application of Prosser-Grandview Broadcasters, Inc. (PGB) and granted the application of Bennet Broadcasting Co. (BBC).[1] The Broadcast Bureau, noting the pendency of a Section 307(b) issue in the proceeding, appeals from that portion of the ruling which dismisses the PGB application without requiring publication in accordance with the provisions of Section 1.525(b) of the Commission's Rules.[2] The Bureau contends that the Presiding Judge erred in concluding that dismissal of the PGB application without publication would not unduly impede the achievement of Section 307(b) objectives, since the PGB application proposes a first local transmission service for Grandview, Washington, whereas the application of BBC proposes a second transmission service for Sunnyside, Washington.

2. The problem posed by the Bureau relates to the distribution of radio service among three small communities, which are in proximity to each other; the communities are situated, running northeast to southwest, in the following order—Sunnyside (pop. 6,800), Grandview (pop. 3,600) and Prosser (pop. 3,600). The FM channel involved here, Channel 224A, is assigned to Sunnyside; however, pursuant to Section 73.203(b) of the Commission's Rules,[3] the assignment is also available to Grandview. BBC, which operates standard broadcast

[1] By Order, FCC 73M-600, released May 18, 1973, an amendment to the agreement was accepted by the Presiding Judge.

[2] No responsive pleadings have been filed.

[3] Section 73.203(b) provides that a Class A channel assigned to a community listed in the Table of Assignments is available upon application in any unlisted community located within 10 miles of the listed community.

Station KREW, licensed to Sunnyside, proposes to locate an FM facility on Channel 224A in that same community; according to its proposal, the FM would duplicate KREW programming during daytime hours. PGB, which operates standard broadcast Station KARY, licensed to Prosser,[4] proposes to operate an FM facility with Grandview as its city of license. According to PGB's proposal, the FM studio and transmitter site would be located midway between Grandview and Prosser at the site of Station KARY; additionally, the proposed FM would duplicate the KARY programming during daytime hours. According to the applicants,[5] BBC would serve most of the area which the withdrawing PGB proposes to serve; [6] thus, except for some areas, located two to four miles east and southeast of Grandview near Prosser, BBC's 1 mv/m contour includes all of the 1 mv/m area proposed to be served by PGB; moreover, two-thirds of Grandview would receive principal city coverage (3.16 mv/m) from BBC. Finally, both applicants consider the cities of Sunnyside, Grandview and Prosser as a common and homogeneous area, and in this connection, indicate that their ascertainment efforts have unearthed similar or congruent needs in the three communities.

3. The Presiding Judge concluded that, for all practical purposes, Grandview has a local transmission service; he reasoned that if the proposed PGB FM facility would be considered a transmission service for Grandview, then the companion AM station, which is located at the same site and has identical programming, is equally a voice for Grandview, even though it is licensed to Prosser. In any event, the Judge noted that the needs and interests of Grandview and Prosser are substantially identical.[7] In its appeal, the Bureau relies on four lines of argument. First, the Bureau contends that since Station KARY is licensed to Prosser, according to the provisions of Section 73.30(a) of the Rules, it cannot be attributed (absent dual city identification) to any other community. Second, petitioner argues that, even though Grandview and Prosser are of similar size and are physically contiguous, they, nevertheless, are separate and distinct communities with separate transmission needs; [8] in this connection, the Bureau notes that both applicants have listed programming designed to fulfill needs and interests peculiar to Grandview. Third, the Bureau asserts that the Section 307(b) considerations which govern allocations are permanent and therefore unaffected by programming, which the Commission repeatedly has held to be transitory in nature. Finally,

[4] FM Station KACA is also licensed to Prosser.

[5] No exhibits have been exchanged, nor has an evidentiary hearing commenced in this proceeding; consequently, the following facts are not a matter of record, but rather drawn from the parties' applications and pleadings.

[6] The coverage figures within the 1 mv/m contour are as follows:

	Area (sq. mi.)	Population
PGB	56.71	15,995
BBC	383	24,533

[7] The Judge also noted that the surviving proposal would serve a larger reception area and would be licensed to the largest and only growing community in the Sunnyside-Grandview-Prosser area.

[8] The Bureau states that the two communities are located in separate counties with separate local governments, school systems, social services, etc.

the Bureau notes that there is no showing as to the reception services in either of the proposed service areas.

4. Based on the information before it, the Review Board is unable to conclude that withdrawal of the PGB application would not unduly impede achievement of a fair, efficient and equitable distribution of radio service among the several states and communities. Contrary to the Presiding Judge's conclusion, it appears that the applicants would not equally fulfill the objectives of Section 307(b); rather, PGB proposes a first local transmission service for Grandview, whereas BBC proposes a second transmission service for Sunnyside. As noted by the Bureau, Sections 73.30 (a) and (b) set out clear and specific criteria for applicants specifying one city or community of license and for those specifying more than one community. Accordingly, since AM station KARY is licensed as a transmission service for Prosser and there is no indication that it meets the specific requirements for dual city allocation, Station KARY may not be considered a transmission service for Grandview. See *Jupiter Associates, Inc. v. FCC*, 136 U.S. App. D.C. 266, 16 RR 2d 2120 (1969); *Five Cities Broadcasting Co., Inc.*, 35 FCC 501, 1 RR 2d 279 (1963). Nor do we agree with the Presiding Judge that, "for all practical purposes", Station KARY can be considered a transmission outlet for Grandview; in this connection, the Bureau has advanced a number of allegations which indicate that Grandview is a separate and distinct community with corresponding and distinct transmission needs. Finally, the lack of record evidence relating to the reception aspects of the two proposals raises an additional question as to the propriety of the Judge's ruling. As the Bureau notes, it is particularly significant that no showing was made as to the reception services which would be received in the area proposed to be served by PGB, but not by BBC.[9] Accordingly, no determination can be made as to whether the dismissing applicant would provide service to underserved areas which its opponent does not propose to serve. In light of all of the foregoing, the Board is of the view that publication requirements of Section 1.525(b) must be met prior to approval of the agreement. See *Almardon, Inc. of Florida*, 15 FCC 2d 299, 14 RR 773 (1968). *Cf. Capital Broadcasting Corp.*, FCC 72–403, 34 FCC 2d 846.

5. Accordingly, IT IS ORDERED, That the Broadcast Bureau's appeal from Presiding Judge's Final Ruling, filed April 11, 1973, IS GRANTED; that the Memorandum Opinion and Order, FCC 73M–349, released March 16, 1973, of Administrative Law Judge Frederick W. Denniston IS SET ASIDE; that action on the joint request for approval of agreement for dismissal of application, filed by the applicants on February 1, 1973, IS HELD IN ABEYANCE; that further opportunity be afforded to other persons to apply for the facilities specified in the application of Prosser-Grandview Broadcasters, Inc.; and that that applicant, will, therefore, comply with the provisions of Section 1.525(b) (2) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

[9] In addition to the rural portion of the area, which petitioners have not accurately delineated, this area includes Prosser and one-third of Grandview.

F.C.C. 73-619

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 81 AND 83—TO PROVIDE ON AN INTERIM BASIS FREQUENCIES AND OPERATING PROCEDURES FOR THE USE OF RADIOTELEPRINTER IN THE MARITIME SERVICES	Docket No. 19670

REPORT AND ORDER

(Adopted June 13, 1973; Released June 18, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. A Notice of Proposed Rule Making in the above-captioned matter was released on January 15, 1973, and was published in the Federal Register on January 19, 1973, (FCC 73-31, 38 F.R. 1941). The date for filing comments thereto have passed.

2. Comments were filed by Brown & Root, Inc. (B&R) and the Radio Technical Commission for Marine Services (RTCM). B&R and RTCM supported the proposed rule amendments and urged their early adoption.

3. B&R noted recent Commission actions to waive for a period of six months the requirement for a radiotelegraph operator aboard vessels equipped with radioteletype equipment. B&R urged the Commission to continue to look favorably upon such requests for rule waiver and extensions of such rule waivers throughout the interim period discussed in the Notice of Proposed Rule Making, or until sufficient data is available to determine whether or not the radiotelegraph operator requirement should be deleted entirely. The Commission is cognizant of this problem and has to date dealt with it on a case-to-case basis. As soon as sufficient information is accumulated, a separate proceeding will be initiated to consider necessary rule changes on a general basis.

4. RTCM suggested that two standards be added to those set forth in the Notice of Proposed Rule Making:

(*a*) That the relative position of "mark" and "space" be fixed; and

(*b*) That the printer speed be fixed at 50 bauds.

The additions suggested by RTCM will remove two variables which otherwise would reduce or negate compatibility where it is desired to quickly establish printer-to-printer operation. Removal of these variables is an essential step in minimizing equipment adjustment preparatory to intercommunication by radioteletype. The two changes suggested by RTCM are, therefore adopted, as set forth in the attached Appendix.

5. In view of the foregoing, IT IS ORDERED, That pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, Parts 81 and 83 of the Commission's rules ARE AMENDED effective July 26, 1973, as set forth in the attached Appendix.

6. IT IS FURTHER ORDERED, That the preceding in Docket No. 19670 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

A. Part 81, Stations on Land in the Maritime Services and Alaska-Public Fixed Stations, is amended as follows:

1. In Section 81.207, a new paragraph (e) is added to read as follows:

§ 81.207 Frequencies for call and reply.

* * * * * * *

(e) Pending availability of an internationally agreed plan for establishing two-way communications by radioteleprinter, the interim procedure set forth in this section may be employed.

(1) Frequencies available: 4186.5, 6279.70, 8373.0, 12559.5, 16746.0 and 22262.5 kHz. Transmitter power shall not exceed one kilowatt.

(2) Transmission on the frequencies set forth in subparagraph (1) of this section shall be limited to calling necessary to establish communication and, thereafter, to informing the receiving station of the working frequency or frequencies to be used. The frequencies set forth in subparagraph (1) of this section shall not be employed for working.

(3) Unless other arrangements have been made with concerned ship stations, the coast station expecting calls by radioteleprinter should maintain three or more receivers on the frequencies, set forth in subparagraph (1) of this section, most likely to be usable for the propagation path involved.

(4) The radioteleprinter equipment shall conform to the standard technical requirements set forth in Subpart E of this Part.

(5) Since coast radiotelegraph stations and ship stations will share use of the frequencies set forth in subparagraph (1) of this section, station licensees should:

(i) Avoid the creation of interference to transmissions already in progress.

(ii) In initiating calls, transmit the call sign of the station called three times, followed by "DE", followed by the call sign of the calling station, transmitted three times. For example, "WXXX, WXXX WXXX DE WYY WYY WYY."

(iii) When the station called does not reply, the call should not be repeated on the same frequency until after an interval of at least 15 minutes.

(6) Calling and station identification shall be effected by radioteleprinter.

(7) The higher frequency of the transmitted signal shall correspond to "space" (start) and the lower frequency of the transmitted signal shall correspond to "mark" (stop).

(8) The radioteleprinter equipment shall operate at a modulation rate of 50 bauds.

B. Part 83, Stations on Shipboard in the Maritime Services, is amended as follows:

1. In Section 83.318, a new paragraph (c) is added to read as follows:

§ 83.318 Ship radiotelegraph calling frequencies.

* * * * * * *

(c) Pending availability of an internationally agreed plan for establishing two-way communications by radioteleprinter, the interim procedure set forth in this section may be employed.

(1) Frequencies available: 4186.5, 6279.70, 8373.0, 12559.5, 16746.0 and 22262.5 kHz.

(2) Transmission on the frequencies set forth in subparagraph (1) of this section shall be limited to calling necessary to establish communication and, thereafter, to informing the receiving station of the working frequency or frequencies to be used. Ship station working frequencies for radioteleprinter are set forth in section 83.320 of this Part. The frequencies set forth in subparagraph (1) of this section shall not be employed for working.

(3) Unless other arrangements have been made with concerned coast stations, the ship station expecting calls by radioteleprinter should maintain a receiver on the frequency or frequencies, set forth in subparagraph (1) of this section, most likely to be useable for the propagation path involved.

(4) The radioteleprinter equipment shall conform to the standard technical requirements set forth in Subpart E of this Part.

(5) Since ship stations and coast radiotelegraph stations will share use of the frequencies set forth in subparagraph (1) of this section, station licensees should:

(i) Avoid the creation of interference to transmissions already in progress.

(ii) In initiating calls, transmit the call sign of the station called three times, followed by "DE", followed by the call sign of the calling station, transmitted three times. For example, "WYY WYY WYY DE WXXX WXXX WXXX".

(iii) When the station called does not reply, the call should not be repeated on the same frequency until after an interval of at least 15 minutes.

(6) Calling and station identification shall be effected by radioteleprinter.

(7) The higher frequency of the transmitted signal shall correspond to "space" (start) and the lower frequency of the transmitted signal shall correspond to "mark" (stop).

(8) The radioteleprinter equipment shall operate at a modulation rate of 50 bauds.

F.C.C. 73-634

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
SAMMONS COMMUNICATIONS, INC.:	
WEST FAIRVIEW, PA.	CAC-677, PA441
NEW CUMBERLAND, PA.	CAC-678, PA435
MIDDLETOWN, PA.	CAC-679, PA433
MIDDLE PAXTON, PA.	CAC-680, PA434
DAUPHNE, PA.	CAC-681, PA895
LOWER SWATARA, PA.	CAC-682, PA430
LEMOYNE, PA.	CAC-683, PA429
MARYSVILLE, PA.	CAC-684, PA432
CAMP HILL, PA.	CAC-685, PA423
HAMPDEN, PA.	CAC-686, PA426
HIGHSPIRE, PA.	CAC-687, PA428
HARRISBURG, PA.	CAC-688, PA427
ROYALTON, PA.	CAC-689, PA896
EAST PENNSBORO, PA.	CAC-690, PA425
STEELTON, PA.	CAC-691, PA438
SWATARA, PA.	CAC-692, PA440
WORMLEYSBURG, PA.	CAC-693, PA442
WEST HANOVER, PA.	CAC-694, PA893
SUSQUEHANNA, PA.	CAC-695, PA439
PENBROOK, PA.	CAC-696, PA437
PAXTANG, PA.	CAC-697, PA894
LOWER PAXTON, PA.	CAC-698, PA436
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted June 13, 1973; Released June 19, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE ABSENT.

1. Sammons Communications, Inc. operates cable television systems in Harrisburg, Pennsylvania and twenty-one surrounding communities. The twenty-two systems, all within the Harrisburg-Lancaster-York, Pennsylvania television market (#57), have twelve-channel capacities, operate from a common headend and are authorized to provide approximately 30,000 subscribers with the following television broadcast signals:

WHP-TV (CBS, Channel 21), Harrisburg, Pa.
WGAL-TV (NBC, Channel 8), Lancaster, Pa.
WTPA (ABC, Channel 27), Harrisburg, Pa.
WLYH-TV (CBS, Channel 15), Lancaster, Pa.
WSBA-TV (CBS, Channel 43), York, Pa.

WITF–TV (Educ., Channel 33), Hershey, Pa.
WBAL–TV (NBC, Channel 11), Baltimore, Md.
WJZ–TV (ABC, Channel 13), Baltimore, Md.
WMAR–TV (CBS, Channel 2), Baltimore, Md.
WKBS–TV (Ind., Channel 48), Burlington, N.J.
WPHL–TV (Ind., Channel 17), Philadelphia, Pa.
WTAF–TV (Ind., Channel 29), Philadelphia, Pa.
KYW–TV (NBC, Channel 3), Philadelphia, Pa.
WPVI–TV (ABC, Channel 6), Philadelphia, Pa.
WCAU–TV (CBS, Channel 10), Philadelphia, Pa.
WTTG (Ind., Channel 5), Washington, D.C.

Sammons has filed applications for certificates of compliance to add the following distant independent signals to its systems' carriage:

WOR–TV (Ind., Channel 9), New York, N.Y.
WPIX (Ind., Channel 11), New York, N.Y.

These applications have been opposed by WGAL Television, Inc., licensee of Station WGAL–TV, Lancaster, Pennsylvania.

2. The only issue contested by the parties to this proceeding is whether the Commission's rules can sanction any additions to the systems' grandfathered signal carriage. The systems are now authorized to carry four distant independent signals, two more than the complement permitted by Section 76.63, applicable to systems in the second fifty major markets. Three of these independent signals are those of Philadelphia UHF Stations WKBS–TV, WPHL–TV, and WTAF–TV, each of which recently extended its service area by way of translator stations licensed to Harrisburg. Sammons argues that these independents should now be treated as "must-carry" signals pursuant to Section 76.61(a)(3), (as incorporated by Section 76.63) and not counted against the number of independent signals the systems might be allowed to add as a "bonus" under Section 76.61(c). In making this contention Sammons acknowledges that the parent signals, not the translators, are now carried on its systems. The systems' operator further emphasizes that its four independent signals (the three Philadelphia stations and Station WTTG, Washington, D.C.) are grandfathered and maintains that they all should be ignored in determining the number of signals it is entitled to add because (1) additional distant independents are desperately needed to insure the continued economic viability of the systems; (2) limiting the systems to their grandfathered complement of television signals "completely defeats the purpose of allowing bonus signals under the new rules"; and (3) additional independents should be "allowed as extra compensation for the new obligations imposed under the new rules." WGAL Television, Inc. insists that the three Philadelphia independent stations should definitely be counted against the number of signals Sammons might otherwise be allowed to add. Should the Commission accept Sammons' argument based on Section 76.61(a)(3), despite the fact that these translators are not, in fact, carried, WGAL further contends that several of the subject communities are not "served" by the translators as required by that section. In any event, WGAL argues, grand-

109-045—73——10

fathered carriage of Station WTTG would limit to one the number of additional independent signals which could be added to the systems.

3. In *Cable TV Company of York*, FCC 73–459, —— FCC 2d —— (1973), the Commission explained the procedure by which one determines the number of "bonus" independent signals an existing cable system may be entitled to carry. We made it clear that an existing system is not automatically entitled to bonus independents, but must show that its minimum signal complement has not been satisfied already by the carriage of a grandfathered signal which is not a market signal or one significantly viewed. The three Philadelphia independents are distant with respect to the Sammons systems and are not significantly viewed. And they more than exhaust the complement of independent signals envisioned for the second fifty major markets. But, because of the recent provision of these signals by translator service in the Harrisburg area we feel our policy must be refined further. As stated in paragraph 10 of our *Reconsideration of the Cable Television Report and Order*, commercial translator stations of at least 100 watts which serve the community of the system shall be "must carry" signals where the system is not carrying the primary station. The effect of this rule mandates that, for the purpose of determining the appropriate number of "bonus" independent signals, we treat otherwise distant primary stations as "must carry" stations where they are also available from local translators. Obviously, the systems involved could cease carriage of primary stations and then be required to carry their local translators. But, it would be unfortunate were the Commission to withhold the benefits of its "bonus" provisions pending the performance of such a ritual. While approximately 2,500 subscribers in four of the subject communities are not technically "served" by the Harrisburg translators, they should be viewed as *de minimis* in comparison to the total subscribership of over 30,000. Consistent with our rules and according to the procedures explained in *York*, Sammons' grandfathered carriage of distant independent WTTG, Washington, limits the systems to one additional independent signal which can be added as a "bonus".

4. Neither party, however, has addressed another issue, that we feel is determinative of this case. Section 76.63 incorporates Section 76.61 (b)(2) governing the importation of distant independent signals into the major markets. According to this latter section a major market cable system wishing to import one or two distant independent stations from the top 25 major television markets must select these stations from one or both of the two closest such markets, where such signals are available. We note that the New York, New York-Linden-Paterson, New Jersey market, where both requested stations are located, is the top 25 market fourth closest to Harrisburg and its surrounding communities. The three top 25 markets closer to the Harrisburg area are, in order of proximity, Baltimore, Maryland, Philadelphia, Pennsylvania-Burlington, New Jersey, and Washington, D.C. The New York City-Paterson market is approximately 50 miles further from the Harrisburg area than is Washington, D.C. Thus, it appears that Sammons' carriage proposals (even for the one signal to which it is entitled) are inconsistent with our Rules. The applicant has

not requested a waiver of our signal carriage rules and we do not believe under the circumstances that the Commission, *sua sponte*, is in a position to suggest what particular station it should request.

5. Applicant submitted plans for the provision of public, educational and government access channels. It proposed that all 22 systems, serving over 30,000 subscribers with 16 broadcast signals, share access facilities and access channel space. According to its proposals, the local originations channel would be used to provide access service when a demand was received from the public, the local educational authorities, or local governmental authorities, and the channel was not in use for its stated originations purpose. Two cable channels normally carrying lower priority network affiliates would also be used for access service during the hours where our exclusivity rules require program deletion. As noted above, the subject systems are entitled to only one additional signal and would therefore only have to provide a public access channel. Even in light of our statement on Reconsideration that we would consider the sharing of access channels by conglomerates, to permit one such channel to serve twenty-two systems with 30,000 subscribers would seem to exceed our most liberal application of this policy. In addition, while we cannot guess the nature of any access proposal Sammons may later submit, several other features of the present scheme are also defective. The use of a local originations channel for access is not permitted (see Section 76.201(a)). We consider it undesirable to confuse access and origination cablecasting for several reasons not least of which, as was noted in paragraph 145 of the *Cable Television Report and Order*, is the difficulty of ascertaining and satisfying fairness and equal time problems which pertain to the origination channel but not the access channels. Further, while a system not obligated to provide access service may use network "black out" space for this purpose, as we note in *Columbus Communications Corporation*, 38 FCC 2d 875 (1972), we will not permit this practice when access service must be provided to comply with our Rules.

In view of the foregoing, the Commission finds that the grant of the subject certificates of compliance would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the applications for certificates of compliance (CAC–677 through CAC–698) filed by Sammons Communications, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 73D-19

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of SOUTH JONES BROADCASTERS, INC., ELLISVILLE, MISS. For Construction Permit	Docket No. 19416 File No. BPH-7445

APPEARANCES

Sheldon C. Hofferman, Esq., on behalf of South Jones Broadcasters, Incorporated; and *William D. Silva, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE ISADORE A. HONIG

(Issued April 20, 1973; Effective June 15, 1973, Pursuant to Section 1.276 of the Commission's Rules)

PRELIMINARY STATEMENT

1. The application of South Jones Broadcasters, Incorporated ("South Jones") seeks a construction permit for a new Class A FM broadcast station to operate on Channel 272A (102.3 MHz) at Ellisville, Mississippi.

2. Originally the South Jones application was designated for hearing with the mutually exclusive applications of New Laurel Radio Station, Inc. ("New Laurel") and Southland, Inc. ("Southland") for a station at Laurel, Mississippi (Dockets Nos. 19414 and 19415) by Order of the Commission released February 8, 1972 (FCC 72-100). Subsequently, the application of New Laurel was dismissed with prejudice at its request by an Order of the Presiding Judge (FCC 72M-355) released March 17, 1972.[1] Thereafter, the application of Southland was also dismissed with prejudice upon grant by the Presiding Judge of a joint petition of Southland and South Jones for approval of an agreement providing for withdrawal of the Southland application and partial reimbursement to Southland for its expenses (see Memorandum Opinion and Order, FCC 73M-360, released March 20, 1973).

3. With the dismissal of the New Laurel and Southland applications, the only issue remaining to be considered in the proceeding is a limited financial qualifications issue inquiring into the availability of funds needed by South Jones. That issue was originally specified as follows:

[1] New Laurel had requested a dismissal without prejudice but without any reimbursement for expenditures.

"1. To determine with respect to the application of South Jones Broadcasters, Incorporated:

"(a) Whether a bank loan of $30,000 will be available to the applicant from the Merchants and Manufacturers Bank of Ellisville, Mississippi.

"(b) Whether, in light of the evidence adduced under the above issue, the applicant is financially qualified."

While the Commission found no reason to raise any question as to the applicant's proposed expenditures or other aspects of its financial plan, the limited financial issue must be construed in light of events subsequent to designation which are indicated below.

4. In paragraph 2 of its Designation Order herein, the Commission found that South Jones would require funds of $41,231 to construct and operate the proposed station for a period of one year. This amount encompassed the following items: payments on equipment lease; interest on loans, if available; first-year operating expenses; and miscellaneous expenses. To meet the cash requirement of $41,231, South Jones claimed the availability of $10,438 in existing capital and bank loans of $5,000 and $30,000 from the Merchants and Manufacturers Bank of Ellisville, Mississippi. The Commission indicated its satisfaction regarding the availability of the existing capital and the $5,000 loan. It found, however, that the $30,000 loan, which was to be secured by the signatures of eleven named individuals, had not been satisfactorily established since those persons had not submitted a statement that they were willing to assume that obligation as required by paragraph 4(a), Section III, FCC Form 301. As mentioned above, subsequent to issuance of the Designation Order, the application of Southland was dismissed pursuant to an agreement whereby South Jones undertook to reimburse Southland for its expenses. The obligation assumed by South Jones in this connection is $9,000. Since the entire $9,000 is to be paid during the first year of operation, it is now necessary for South Jones to establish the availability of this amount in addition to the $30,000 loan which the Commission questioned in the Designation Order.

5. In light of the additional sum required, the availability of funds issue must now be viewed as if it were stated in either of the following ways:

". . . (a) whether a bank loan of $30,000 will be available to the applicant from the Merchants and Manufacturers Bank of Ellisville, Mississippi, and whether an additional $9,000 needed by the applicant will be available from any source."

or

". . . whether South Jones has available to it a total of $50,231 [$41,231 + $9,000] needed to construct and operate its proposed station for a period of one year.

"(b) whether, in light of the evidence adduced under the above issue, the applicant is financially qualified."

6. A formal prehearing conference was held on March 17, 1972, and an informal prehearing conference was held on January 10, 1973. The evidentiary hearing on the financial qualifications issue was held on March 27, 1973, and the record was closed on that date. The parties waived the right to file proposed corrections to the transcript. Proposed findings of fact and conclusions were filed by South Jones on

April 10, 1973. The Broadcast Bureau did not file proposed findings of fact and conclusions, and Bureau counsel informally notified the Presiding Judge that the Bureau would not file a reply.[2]

FINDINGS OF FACT

7. The evidence of record, which reflects the changes in both cash requirements and availability of funds subsequent to the Designation Order, shows funds either on hand or otherwise available to South Jones in the total amount of $59,346 after allowing for interest paid on March 20, 1973, in the amount of $2,100 (South Jones Ex. 1, pp. 2–4).[3] The $30,000 loan in question was shown to have been made on March 20, 1971. According to the terms of the bank's commitment, that loan ". . . is renewable each year on the anniversary of the making thereof at the option of South Jones and upon payment of interest accrued thereon on or before the due date . . ." (South Jones Ex. 1, p. 6). At present, the proceeds of the loan, together with other funds, all to be used for construction and operation of the station, are on deposit either at the Merchants and Manufacturers Bank of Ellisville or in the Commercial National Bank and Trust Company of Laurel, Mississippi, as follows (South Jones Ex. 1, pp. 3–4):

Merchants and Manufacturers Bank	$39,340
Commercial National Bank and Trust Co	6,006
Total	45,346

8. In addition to the funds on deposit as listed above, the Merchants and Manufacturers Bank has agreed to make available to Glynn E. Holland and Herbert D. Knotts, principals and, together with their wives, majority stockholders of the applicant, up to $14,000 which they, in turn, will lend to South Jones (South Jones Ex. 1, p. 7). Messrs. Holland and Knotts and their wives have certified that they will lend the needed funds to the corporation, with the first payment to begin one year after the beginning of operation of the station (South Jones Ex. 1, p. 4). This $14,000, added together with the $45,346 noted above, totals $59,346.

9. From the total of $59,346 available to the applicant must be deducted the sum of $2,100, representing interest accrued on the $30,000 loan which was paid to the bank on or before March 20, 1973 (Tr. 88). The effective total amount of cash which will be available, then, is $57,245.[4]

[2] At the hearing (Tr. 93), Bureau counsel conceded that the financial issue against South Jones has been satisfactorily met by the evidence adduced by this applicant.

[3] The facts as to the interest payment were stipulated (Tr. 88). The date of the payment was mistakenly referred to at the hearing as March 1, rather than March 20 which is found to be correct (see, statement of counsel for applicant, fn. 2 of proposed findings).

[4] At the hearing, there was some discussion of a further interest payment of $2,100 to be made by the corporation to the bank in March of 1974, which would effectively further reduce the available amount to $55,146. However, it was overlooked at that time that a figure of $2,500, representing one year's interest on the loan, had already been included as a cost by the Commission in paragraph 2 of its Designation Order. Accordingly, it would appear that the $57,246 figure is correct, rather than the $55,146 figure. Also not considered was interest to be received by the corporation on funds on deposit, which will be accruing throughout the period of construction and first year of operation. However, no calculation has been made of this interest, which will provide an available source of additional income in an undetermined amount (Tr. 96). In any case, the total funds available will substantially exceed the total amount needed.

CONCLUSIONS

1. To prove itself financially qualified under established Commission policy, South Jones is required to show the availability of sufficient funds to construct and operate its proposed FM station for one year without reliance on revenues. With respect to the issue of availability of funds, South Jones has demonstrated that it can produce cash in excess of $57,000. This sum is more than sufficient to meet the estimated construction costs and first-year operating expenses as well as the $9,000 to be paid in consequence of the dismissal of a formerly mutually exclusive application. Accordingly, South Jones is found to be financially qualified in terms of the financial issue as it has been construed in light of developments subsequent to designation touched upon above.

2. Since the Commission found the applicant qualified except for its financial qualifications, it is evident that South Jones must now be held qualified in all essential respects to be a permittee. Accordingly, it is concluded that a grant of its application for a new FM broadcast station at Ellisville, Mississippi would serve the public interest.

In view of the foregoing, IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Rules, the application of South Jones Broadcasters, Incorporated for a new Class A FM broadcast station to operate on Channel 272A at Ellisville, Mississippi, IS GRANTED.[5]

FEDERAL COMMUNICATIONS COMMISSION,
ISADORE A. HONIG, *Administrative Law Judge.*

[5] The Commission's Order of Designation provided that in the event of grant of the South Jones application, consent was given to the specified main studio location outside the city of license.

F.C.C. 73-680

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 73 OF THE COMMISSION'S RULES AND REGULATIONS TO RESTRICT TRANSMISSION OF THE STEREOPHONIC PILOT SUBCARRIER BY FM STATIONS DURING PERIODS OF MONOPHONIC PROGRAM TRANSMISSION	Docket No. 19571

REPORT AND ORDER

(Adopted June 21, 1973; Released: June 25, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE CONCURRING IN THE RESULT; COMMISSIONER HOOKS ABSENT.

1. In a Notice of Proposed Rule Making in this proceeding, adopted August 9, 1972 (FCC 72-721) the Commission proposed an amendment to Section 73.297 of its Rules and Regulations, which, with respect to those FM broadcast stations equipped for stereophonic broadcasting would prohibit transmission of the pilot subcarrier by such stations for continuous periods of operation with monophonic program material in excess of five minutes. It was suggested that interspersed segments of monophonic material, such as voice announcements, presented no problem, whereas long periods of monophonic programming in the stereo transmission mode could be misleading to the listener, and constituted less than full use of the broadcaster's facilities, since the coverage of the station, with monophonic programming, is reduced to that obtainable with stereo transmission.

2. As extended by our Order of September 19, 1972, the deadlines for filing comments and reply comments in this proceeding were October 13, 1972, and October 24, 1972, respectively. Thirty-nine parties filed timely comments. PSA Broadcasting, Inc., and California Broadcasters Association filed late comments accompanied by petitions requesting their acceptance. Their petitions are granted and the comments have been considered in arriving at this decision. While the filings of Nassau Broadcasting Company and Harvard Radio Broadcasting Company, Inc., were also tardy, in this particular instance their acceptance and consideration have been feasible without the introduction of additional delay in the progress of the proceeding. One reply comment was filed.

3. The parties who filed comments and reply comments are as follows:

Peninsula Broadcasting Corp. (KPEN(FM)).
Cosmopolitan Broadcasting Corp. (WHBI).
Southern Broadcasting Co.
222 Corporation (WCKW).
WCLV.
FM Broadcasting Corp. (WHLI–FM).
Wake Forest University (WFDD–FM).
Rice County Broadcasting Co., Inc. (KLOQ).
The Pueblo Stereo Broadcasting Corp. (KVMN–FM).
WMRY Radio.
Paul F. Burns.
Carter Publications, Inc. (WBAP–FM).
National Association of Broadcasters (NAB).
Manhattan Broadcasting Co., Inc. (KMKF).
Metromedia, Inc.
Charlottesville Broadcasting Corp. (WQMC).
University of Missouri.
Columbia Broadcasting System, Inc. (CBS).
Lunde Corp. (KLFM).
Temple University (WRTI(FM)).
National Public Radio (NPR).
Carroll County Broadcasting Corp. (WTTR–FM).
Brown Broadcasting Service, Inc. (WBRU(FM)).
Charles River Broadcasting Co. (WCRB(FM)).
Pacific and Southern Co., Inc.
Iowa State University of Science and Technology (WOI–FM).
National Association of FM Broadcasters (NAFMB).
National Broadcasting Co., Inc. (NBC).
VIP Broadcasting Corp. (WVIP–FM).
Multimedia, Inc. and Newhouse Broadcasting Corp.
Texas Coast Broadcasters, Inc. (KQUE/KAYD).
Rust Communications Group, Inc.
WTFM, Inc.
Chronicle Broadcasting Co. (KRON–FM).
Wometco Skyway Broadcasting Co. (WLOS–FM).
Darrell K. Burns.
Great Northern Broadcasting System, Inc. (WLDR(FM)).
Broadcast-Plaza, Inc. (WTIC–FM).
Fetzer Broadcasting Co. (WJFM(FM)).
Nassau Broadcasting Co.
PSA Broadcasting, Inc.
Harvard Radio Broadcasting Co., Inc. (WHRB–FM).
California Broadcasters Association.
Nationwide Communications, Inc. (WNCI(FM)) (Reply Comment).

All comments have been fully considered in arriving at a decision in this proceeding.

SUMMARY OF COMMENTS

4. With a very few exceptions, the parties are opposed to the adoption of the rule, amended as proposed. A number would find it acceptable if the period of permissible monophonic programming in the stereo mode were extended—suggested periods are ten minutes, fifteen minutes, or one-half hour—or if the restriction were applied only with respect to musical programs. It is contended that the five minute limitation on monophonic programming in the stereo transmission

mode is insufficient to accommodate many of the [1] monophonic (usually speech) program segments normally included in the broadcast of stations whose programming is predominantly stereophonic, and that inadequate flexibility is afforded for unscheduled programs such as special newscasts. There were several suggestions that, in lieu of a rule in the form proposed, we require an announcement periodically that certain of the programs or selections broadcast over the preceding period were in monophonic sound.

5. Generally, however, the consensus is that the rule is not only unnecessary, but its implementation would create annoyance and dissatisfaction on the part of the listener outweighing any benefit he might obtain from the identification of monophonic programming and impose a burden on the broadcaster so substantial that, in net effect, it will tend to discourage the news, public affairs, and other non-entertainment programming which the Commission has found to be in the public interest, or, alternatively, to engender undesirable operating practices.

6. The rule is held to be unnecessary because listeners are sufficiently sophisticated that they do not expect speech, which is the obvious and predominant source of monophonic programming, "in stereo", even though transmitted and received in the stereo mode. It is maintained that there has been a complete absence of listener complaints to the many stations which adhere to this practice. On the other hand, listeners do object when stations change intermittently between stereophonic and monophonic transmission. It is pointed out that each time the station reverts to monophonic transmission, at least with many stereo generators, an undesirable increase in the volume of the received program results. Of more serious consequence, is the effect on the many receivers which can be switched to operate in a "stereo only" mode. These receivers, when operated in this manner, will reject any monophonic signal. Thus, each time a stereo station changes to monophonic transmission, such a receiver, tuned to this station is muted. Not only can this be highly annoying to the listener and detrimental to the station, whose transmissions will be rejected, but, some of the parties contend, on occasion may be dangerous—for instance, listeners may fail to receive an urgent weather warning.

7. The burden on the station operator in complying with such a rule, it is claimed, is substantial. He is already charged with the responsibility of monitoring various operating parameters, and is usually engaged in programming duties of various kinds, and must remember to switch between stereo and monophonic operation at the proper times. He may forget to switch to mono, when required, thus subjecting the station to Commission sanction, or he may fail to restore stereo transmission when the program material is stereophonic. The switching itself may involve difficulties if the station is automated or operated by remote control. Furthermore, the operator may have difficulty in determining which of various selections included in program material prerecorded by others are stereophonic.

[1] The pilot subcarrier is transmitted, of course, only when the station is switched for stereophonic transmission. In the review of the comments and in the subsequent discussion it is found convenient to compare operation in the "stereophonic transmission mode" with operation in the "monophonic transmission mode", rather than to consider conditions with the pilot subcarrier "on" or "off".

8. In the latter connection, National Public Radio is of the opinion that before the Commission can equitably and intelligently undertake to enforce a rule such as it has proposed, it will be necessary for it to define in the rules just what is meant by stereophonic programming—noting the availability and use of program material originally monophonically recorded, which has been rerecorded with reverberation, frequency separation and phase shift techniques to produce pseudo-stereo effects.

9. It is suggested that some broadcasters might find compliance with such a rule so onerous that they would seek to mitigate its impact by increasing the percentage of stereo programming at the expense of news and public affairs programs, which are almost entirely talk programs, and are accordingly, monophonic. This may be true particularly of public service programs such as church services which are obtained "live" by remote pickup. These programs, although they might be susceptible to stereophonic transmission, are relayed to the station monophonically for reasons of convenience and economy. Alternatively, at least with respect to locally produced programs of this nature, they might seek technical compliance with the rule by, for instance, using two microphones, for a single announcer and feeding the output of each into the left and right channel inputs, respectively. This expedient is held to be undesirable on two counts—received in stereo a movement of the speaker's head toward one or the other microphone causes an annoying shift in his apparent position at the receiving location and, when the program is received monophonically, partial phase cancellation occurs which can reduce the intelligibility of the program material.

10. Finally, it is contended that the more extensive coverage which the station sacrifices when it provides monophonic programming in the stereo mode as compared to monophonic transmission is not an important consideration. The gain during monophonic transmission is apparent only in fringe areas, and the better service to listeners in these areas is not reliable, since it deteriorates each time the station reverts to its predominantly stereo mode of operation.

DISCUSSION AND DECISION

11. The informal policy which the Commission established a number of years ago concerning the transmission of stereo pilot subcarrier during periods of monophonic programming, which we have sought to formalize by the rule amendment proposed in this proceeding, when viewed in the light of the rather comprehensive exposition of the present operating practices and problems of FM stereo broadcasting presented in the comments herein, must be considered as an unnecessarily restrictive means for reaching our principal objective—to preclude extensive periods of monophonic programming in the stereo transmission mode by a station without adequate notice to the listener that the programming is in fact monophonic.

12. We are persuaded to this view, even though we are of the opinion that a number of adverse effects cited by the parties as eventuating should the rule be adopted would not, in fact, be as severe as

they predict. For instance, the most frequently mentioned impediment to its effective implementation is the use by the general public of many receivers which may be operated in a "stereo only" mode. When utilized in this mode, such a receiver delivers no sound if tuned to a monophonic transmission. Accordingly, if a station programming and transmitting normally in stereo were required to change to monophonic transmission for each period of monophonic programming a receiver tuned to its signal would be periodically muted—obviously an undesirable situation both for the listener and for the station. However, it should be noted that the "stereo only" mode of operation is offered as an additional feature on the more elaborate receivers. All of these receivers, it is believed are capable of operating in the normal stereo mode, in which each station's programs are reproduced whether its transmissions are stereophonic or monophonic. Should it become the universal and required practice for all stereo stations to utilize monophonic transmission during periods of monophonic programming, we believe that listeners would soon learn that they must avoid the "stereo only" settings of their receivers if they wished to receive uninterrupted service from each FM station.

13. Also, we are convinced that the operating problems which are cited as burdening the station licensee could be alleviated through the employment of comparatively simple systems for automatic or semi-automatic stereo/mono switching, should the need arise.[2]

14. Therefore, we are not convinced that the effects of the rule which has been proposed would be so burdensome and otherwise undesirable as to lessen substantially the incentive and capability of the broadcaster to present the kinds of programs, such as public affairs and news usually monophonic in nature, whose broadcast we have held to be in the public interest. Nevertheless, while we believe the parties in the interest of vigorous advocacy, may have over emphasized the problems which adoption of the rule would engender, their presentations have caused us to review the basic premises on which the rule was formulated, and to question whether there are positive benefits to be gained through its implementation are sufficient to outweigh such limitations on the broadcaster and may be imposed.

15. Assuming that the comments received are from parties who are a representative cross section of FM licensees whose stations are equipped for stereophonic transmission, the picture presented is of a group who value and promote their stations as "stereo" stations, and who utilize stereo program material to the extent that it is available. Thus, a high percentage of all musical programming is stereophonic; monophonic recordings (usually of an earlier era) are employed only when stereo versions are not available, and the airing

[2] Such a system, of course, could not be expected to differentiate between monophonic or stereophonic program material where the nature of the material was not obvious. However, as many of those commenting note, musical programming is predominantly stereo, while voice transmissions are almost entirely monophonic. A gross differentiation on this basis by automatic means, should easily be possible. Manual switching would become necessary only for extended periods of monophonic musical programming, or for those occasional talk programs (such as round table discussions) which would benefit from a stereophonic presentation.

of the monophonic material will provide listeners with a kind of musical fare they might otherwise be unable to enjoy. Speech, which includes newscasts, sports, and many public affairs programs, is, by its very nature, monophonic, and attempts to simulate stereophonic effects have been found to destroy its realism, or sometimes adversely affect its intelligibility. It is the practice of the majority of stereo stations, except for extended periods of monophonic programming, to broadcast all programs in the stereophonic transmission mode, not only because it is more convenient for them to do so, but, more importantly, because experience had demonstrated that this is the kind of operation which is most acceptable to the average listener. Many others, however, revert to monophonic transmission when monophonic programming is utilized for extended periods of time. It is the consensus that the frequent changing between monophonic and stereophonic transmission modes in accordance with the nature of the program material would cause far more audience dissatisfaction than is occasioned by present modes of operation. We will accept this evaluation of the situation, and, accordingly, will not adopt the rule, as proposed.

16. There remains the question of whether sufficient public benefit would accrue to justify the adoption of a modified rule intended to require monophonic transmission during continuous monophonic programming extending over considerable periods of time, such as a half hour, or more. After full consideration of the matter in the light of the comments received, we have concluded that this approach should be rejected. While we have adverted to the greater useful coverage of a station when operating in the monophonic mode, we recognize that, in practice, the gain is quite small, if it is assumed that, regardless of the mode of transmission, the receivers of listeners in fringe areas will be switched manually or automatically to receive the station's signals in the monophonic reception mode, in which the signal to noise ratio is optimum. Weighed against the comparatively small increase in coverage achieved through monophonic transmission (which, as the comments point out, would, in any event, be realized only intermittently, and could not be regarded as reliable service) is the possibility that some broadcasters, rather than reverting to monophonic operation for periods of nominally monophonic programming, may be encouraged to adopt various expedients to produce pseudo-stereo effects, a procedure which, while it might, on occasion, produce acceptable results, seems to us to be generally undesirable. In this connection, we recognize that, as the comments suggest, any rule of the nature proposed, if it is to be enforced effectively and equitably, must be supported by other rules specifically defining monophonic and stereophonic programming. We do not reject this task as being unduly difficult; rather, we feel that our rules can do without the resulting complication.

17. While, therefore, we believe that good operating practice normally would dictate operation in the monophonic transmission mode for extended periods of monophonic programming, we will rely on

each licensee to choose the mode of operation which its experience indicates will be the more acceptable to its listening audience. Thus, we will not establish a specific restriction on transmission of the stereophonic pilot subcarrier during periods of monophonic programming.

18. Accordingly, neither the amendment of the rules, proposed in this proceeding, nor any modification thereof, will be adopted.

19. IT IS ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-234

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of TOWN RADIO, INC., MCCONNELLSBURG, PA. For Construction Permit	Docket No. 19040 File No. BP-19321

MEMORANDUM OPINION AND ORDER

(Adopted June 19, 1973; Released June 22, 1973)

BY THE REVIEW BOARD.

1. The Review Board has before it a motion to deny application in the above captioned proceeding, filed May 7, 1973, by the Broadcast Bureau.[1] In support of its motion, the Bureau notes that when the application of Town Radio, Inc., (Town Radio) was designated for hearing, the Commission provided that in the event of favorable action on the Town Radio application, final action on the application would be withheld pending the ultimate determination in Docket No. 15835 (involving the application of Lebanon Valley Radio, Inc.). The reason for this condition was the common ownership of Arthur K. Grenier in both Town Radio and Lebanon Valley Radio Inc. (Lebanon). The Initial Decision of the Administrative Law Judge in this proceeding, which is now before the Review Board, was so conditioned.

2. The Review Board in its decision in *Lebanon Valley Radio*, 35 FCC 2d 243 (1972) concluded that Lebanon's principals, including Grenier, had failed to meet the standard of integrity and truthfulness expected by the Commission from licensees and applicants. The Lebanon application was therefore denied. An application for review of that decision was denied by Commission Order, FCC 73-276, released March 6, 1973. Based on that action, the Bureau requests the Board to deny the Town Radio application. In opposition, Town Radio notes that Lebanon has appealed the adverse decision to the United States Court of Appeals for the District of Columbia and contends that, until the court has acted on that appeal, the matter is not ultimately decided. Town also contends that even were the Commission's action in Lebanon an ultimate determination, its application may not be denied without further hearing.

3. The motion to deny application will be dismissed. The Review Board agrees with Town Radio's contention that the qualifications of

[1] The Board also has before it an opposition to the Bureau's motion, filed by Town Radio on June 4, 1973, and the Bureau's reply, filed June 14, 1973.

Lebanon and its principals will not be ultimately decided until that applicant exhausts its appellate rights. Moreover, the Board is of the view that no useful purpose would be served by consideration of the merits of this motion until Lebanon has exhausted its right of appeal.

4. Accordingly, IT IS ORDERED, That the motion to deny application, filed May 7, 1973 by the Broadcast Bureau IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-669

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
TRI-STATE BROADCASTING CO. (WGTA), SUMMERVILLE, GA.
Has: 950 kHz, 5 kW, Day, Class III
Requests: 950 kHz, 100 W, 5 kW-LS, U, Class III
For Construction Permit

MEMORANDUM OPINION AND ORDER

(Adopted June 21, 1973; Released June 26, 1973)

BY THE COMMISSION: COMMISSIONER HOOKS ABSENT.

1. The Commission has before it for consideration the application of Tri-State Broadcasting Company (WGTA) and the accompanying request for waiver of section 73.21(b)(1)(ii) of our rules.

2. The proposed 100-watt nighttime operation is in contravention of section 73.21(b)(1)(ii) of our rules which requires that the nighttime power of the proposed operation be at least 500 watts.[1] WGTA claims that its application complies with Commission rules in all other respects. Since the reasons advanced in support of the request for waiver are not sufficient to overcome our objections to substandard low-power operations, we will deny the request for waiver and return the application as unacceptable for filing.

3. WGTA contends that the nighttime allocation considerations require that an expensive directional antenna system would have to be designed and constructed if the 500-watt minimum power requirement of our rules is to be met, whereas protection to co-channel nighttime operations and coverage in accordance with the rules would obtain with the less expensive 100-watt nondirectional proposal. WGTA states that it is unable to afford the design, construction, and maintenance of a suitable directional antenna system.

4. The applicant claims that a waiver of the minimum power requirement is warranted because of the substantial need for local nighttime service in Summerville. At present, there is no primary nighttime AM service to the community. Several letters from local officials are included with the request for waiver. These letters point out, among other things, that hazardous events (e.g., fires, dangerous highway conditions, escaping criminals) often occur at night. Thus, it is argued,

[1] In addition, the proposed operation does not appear to comply with the power requirements of the North American Regional Broadcasting Agreement (NARBA). Since we are denying the request for waiver of our own rules, we find it unnecessary to rule on the apparent violation of NARBA.

109-045—73——11

a local nighttime service is necessary to help cope with these emergencies. This argument fails to consider section 73.98(d) of our rules. In essence, this rule permits daytime-only stations to transmit, on a non-commercial basis, nighttime traffic dealing with weather emergencies and other conditions endangering life and property. This authority is without regard to interference caused to other stations, but is limited to emergency situations in which unlimited-time service is either unavailable or inadequate. Since there is no primary nighttime AM service to Summerville, WGTA is clearly in a position to realize the maximum operating benefits of this rule. With respect to public service programming of a non-emergency nature, we note that this may be broadcast on a delayed basis during WGTA's authorized daytime hours of operation. Indeed, J. R. Dowdy, the Mayor of Summerville, in a letter supporting WGTA's request for waiver, notes that WGTA presently provides "excellent service" by broadcasting Summerville's City Council meetings on a delayed basis.

5. The reason for our minimum power requirement is to prevent substandard operations from inefficient use of the channel by depleting the available spectrum. Although it is claimed that the proposed 100-watt operation would not cause interference to any co-channel stations according to our rules, it is axiomatic that each new signal does contribute to the overall interference level on the channel. Moreover, future proposals which would operate at standard powers and which may serve many more people than the approximately 9,000 which would be served by the WGTA proposal may be precluded or severely restricted because of the necessity of providing protection to a substandard WGTA operation.

6. As the applicant points out, section 73.99 provides for pre-sunrise operation with power below that otherwise required by the rules. The applicant fails to recognize, however, that a pre-sunrise operation is not a licensed operation and does not have rights under section 316 of the Communications Act, 47 U.S.C. § 316. Section 73.99(f) of our rules provides that "[the pre-sunrise service authority] is secondary to the basic instrument of authorization and may be suspended, modified, or withdrawn by the Commission without prior notice or right to hearing. . . ." Pre-sunrise operations do not have to meet, for instance, the city coverage requirements of our rules; and they are not protected from interference from new or existing operations. A comparison between the WGTA proposal, which would be a fully licensed operation requiring protection, and pre-sunrise operations is simply not valid.

7. The waiver of the minimum power requirement of section 73.211 for Marianas Broadcasting Corporation, Agana, Guam, on March 21, 1973, is cited as precedent. The special circumstances underlying that waiver, however, do not apply here. In that instance, a waiver was granted because the proposed power was sufficient to provide adequate service to the relatively small island of Guam. Operation at the minimum power of 25 kilowatts required by section 73.211 would merely be paying lip service to the rules while not increasing the service provided to the residents of Guam. Further, in Guam there is very little chance that a low-power FM broadcast service would preclude additional services.

8. We have considered the minimum power requirements in the past. Indeed, over twenty years ago we amended our rules to prohibit the type of operation now proposed. *Assignment of Class IV Stations*, 8 RR 1501 (1952). Further, only seven years ago we *raised* the minimum power requirements for stations operating on local channels. *Minimum power for Class IV Stations*, 3 FCC 2d 849, 7 RR 2d 1670 (1966). We concluded at that time that the addition of more stations does not necessarily result in "more service to more people." Experience with TV and FM allocations taught us that there is "a point in which the greatest service to the largest areas and populations is provided and increasing the number of stations (. . . by lower power in AM) soon results in 'islands of service' and 'oceans of interference.'" 3 FCC 2d at 851. Earlier this year, in the conclusion of the rule-making proceedings in Docket 18651, *Broadcast Station Assignment Standards*, 39 FCC 2d 645, 26 RR 2d 1189 (1973), we again decided against adopting rules which would permit low-power, substandard nighttime operations such as WGTA now proposes. 39 FCC 2d at 676. Indeed, it was WGTA that filed comments on this subject during the proceeding. At that time we found the arguments in favor of low-power nighttime operations to be insufficient. Now, WGTA is attempting to accomplish by waiver what it failed to do by rule making. We find its arguments equally unpersuasive in the present context.

9. If the Commission subverts its own rules and technical standards by allocating stations on the basis of individual applicants' incapabilities, whether they be financial or otherwise, as appears to be suggested by the applicant, the inevitable result will be a deterioration of service provided to the public. However appealing arguments may be in an individual instance. WGTA is not an isolated or unique case. On the 950 kHz channel alone there are approximately 25 daytime stations, many of which might qualify for nighttime operation under the criteria which WGTA advances in support of its request for waiver. Indeed, there are probably hundreds of daytime-only stations throughout the standard broadcast band in circumstances similar to those of WGTA. A grant of the requested waiver would, in effect, open the floodgates to substandard low-power nighttime operations and circumvent the very rule-making proceeding in which we decided against such substandard operations less than four months ago. *Broadcast Station Assignment Standards*, *supra*. When the minimal service which would be provided by substandard low-power operations, such as the one proposed here, is weighed against the resulting general degradation of the channel due to interference and the restrictions which would be imposed on normal full-power proposals, we are compelled to conclude that such operations would not result in an efficient utilization of the available spectrum.

10. While we are denying the requested waiver, we find that the engineering studies accompanying this proposal appear to demonstrate that the community presently does not receive a nighttime interference-free groundwave signal of 5 mV/m or greater from an authorized standard broadcast station or a signal of at least 3.16 mV/m from an

authorized FM station and that no FM channel is available. Accordingly, it appears that under section 73.37(e)(2) of our rules, the community is eligible for the assignment of an unlimited-time standard broadcast station. Obviously, however, any such proposal must conform with *all* of the requirements of our rules, including the provisions pertaining to minimum power, protection to existing stations, and adequate coverage of the city of designation.

11. We have fully considered the comments submitted in support of the request for waiver of section 73.21(b)(1)(ii), but we find that the circumstances presented are not sufficient to warrant favorable consideration of the request for waiver. Since the applicant has failed to set forth sufficient reasons, if true, to justify waiver, there is no need to conduct a hearing and the application will be returned. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).

12. Accordingly, IT IS ORDERED, That the request of Tri-State Broadcasting Company for a waiver of section 73.21(b)(1)(ii) IS DENIED and the application IS HEREBY RETURNED as unacceptable for filing.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-622

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of APPLICATION FOR EXEMPTION FROM THE RADIOTELEPHONE PROVISIONS OF TITLE III, PART III OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED FOR THE UNITED STATES PASSENGER VESSELS "ALBATROSS" AND "SEA HAWK"	X-1138, X-1139

MEMORANDUM OPINION AND ORDER

(Adopted June 13, 1973; Released June 18, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE, ABSENT.

1. The Commission has received applications (Filed Numbers X-1138 and X-1139) for exemption from the radiotelephone requirements of Title III, Part III of the Communications Act of 1934, as amended for the United States passenger vessels ALBATROSS and SEA HAWK respectively.

2. The applicant makes the following statements in support of his request:

a. The vessels operate in the protected waters of Laguna Madre Bay, Texas adjacent to the Gulf of Mexico, never more than 1000 feet from land;

b. Any period over 1000 from land would be for a brief period of two or three minutes;

c. Fishing is conducted in an area with many small boats, some of which are equipped with Citizens Band (CB);

d. Monitoring of 2182 kHz is virtually worthless as only a small number of party boats monitor this frequency and they are operating in the Gulf of Mexico; and

e. The equipment will be retained on board as a voluntary installation, but granting an exemption from the watch and installing CB equipment would enhance the safety of these boats and others fishing in the area.

3. The United States Coast Guard has advised us that these vessels are certificated to carry more than 6 passengers up to one mile from shore and not more than 30 minutes from the dock at Port Isabel or the Colley's dock on South Padre Island. These operations are authorized for daylight hours only. The Coast Guard also advises that while the Laguna Madre Bay is very shallow, that the bottom is such that it is difficult to wade for great distances, and that in fact, there have been drownings as a result of boating accidents.

4. The Commission has granted a general exemption from the requirements of Title III, Part III of the Communications Act of 1934, as amended for all United States vessels subject to Title III, Part III which are less than 50 gross tons and are navigated not more than 1000 feet from the nearest land. In other cases, the policy is to grant exemptions to vessels which do not meet the requirements of the general exemption where it can be determined that (a) the water is so shallow and other circumstances are such that in the event of a distress, passengers could safely reach shore without outside assistance, or (b) there are no ship or coast stations from which assistance could be requested by the radio installation.

5. We have reviewed the applications and determine as follows:

a. An analysis of the routes of the voyages shows that when the vessels depart from the Colley's Dock on Padre Island for the fishing area adjacent to the Laguna Madre channel they are within 1000 feet of land except for a distance of ¾ mile where they are from 2000 to 3000 feet from land. Assuming a speed of 14 knots, the vessels will be beyond 1000 feet, the distance specified in the general exemption, for a period of less than 4 minutes. We find, however, that when the vessels are navigated to the fishing areas adjacent to the Intracoastal Waterway, that the vessels not only exceed the 1000 feet from land but also exceed the one nautical mile certificated by the U.S. Coast Guard.

b. These vessels fish in areas adjacent to the Intracoastal Waterway and the Brownsville Ship Channel. These channels are frequented by pleasure craft, fishing vessels and commercial vessels which are equipped with marine radiotelephone stations. In addition, the Port Isabel Coast Guard station maintains a continuous watch on 2182 kHz and 156.8 MHz, the radiotelephone distress frequencies.

c. CB installations are usually provided for personal or business communications not available in other services. CB stations on vessels may communicate with other vessels and locations on shore such as a home, car or campsite. There is no single CB channel available as a calling or distress frequency and, in fact, there are seven frequencies authorized for communication between stations of different licensees. The United States Coast Guard does not maintain a watch on any CB frequencies, therefore, there would be no assurance that any distress call would be received. While CB could be a desirable adjunct to a marine radiotelephone station for personal communications, it can not, however, be considered as a satisfactory substitute for a marine radiotelephone station for compliance with the compulsory radio requirements of the Communications Act.

d. The Laguna Madre Bay is described in the United States Coast Pilot, Volume 5 (U.S. Department of Commerce, Environmental Sciences Services Administration/Coast and Geodetic Survey) as a shallow body of water ranging in depth from zero to 9 feet with reefs and mudflats throughout. The diurnal range of tide at Brazos Santiago is 1.4 feet and at Port Isabel 1.3 feet. The variation in the water level is largely dependent on the wind. Since the chart submitted with the application (Nautical Chart 898 SC) shows a depth varying from 3 to 5 feet at mean low tide, the depth can be as much as 6 feet at times,

and possibly higher during periods of high winds, therefore, it can not be assumed that passengers could readily wade ashore without assistance.

6. The subject vessels are equipped with radiotelephone installations complying with Title III, Part III of the Communications Act and the applicant wishes to retain these stations on a voluntary basis. Thus, we see no extenuating circumstances involving installation problems, limited space, or operator problems which might warrant further consideration.

7. In view of the foregoing, we find that the applicant has made no substantial showing that the routes of the voyages and other circumstances are such as to make a compulsory radiotelephone installation unreasonable or unnecessary for the safety purposes of Title III, Part III of the Communications Act.

8. Accordingly, IT IS ORDERED, That the applications for exemption from the radio requirements of Title III, Part III of the Communications Act of 1934, as amended, in behalf of the United States passenger vessels ALBATROSS, official number 293314, 19.9 gross tons and SEA HAWK, official number 520476, 16 gross tons ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

F.C.C. 73R–201

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of VOICE OF DIXIE, INC., BIRMINGHAM, ALA.	Docket No. 18664 File No. BPH–6449
FIRST SECURITY & EXCHANGE CO., BIRMINGHAM, ALA.	Docket No. 18666 File No. BPH–6610
For Construction Permits	

APPEARANCES

S. White Rhyne, Jr., and *Eugene F. Mullin*, on behalf of Voice of Dixie, Inc.; *Morton L. Berfield* and *Lewis I. Cohen*, on behalf of First Security and Exchange Company; and *Earl C. Walck* and *William D. Silva*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted May 22, 1973; Released May 31, 1973)

BY THE REVIEW BOARD: BERKEMEYER, NELSON, AND KESSLER.

1. This Decision is primarily concerned with two issues. As an initial matter, the Review Board must determine whether or not one applicant, given the totality of the evidence, has minimally satisfied the requirements of the *Primer on Ascertainment of Community Problems*, 27 FCC 2d 650, 21 RR 2d 1507 (1971). If this is affirmatively established, then a choice must be made between two applicants, one which warrants a moderate preference under the best practicable service criterion of the comparative issue, and another which merits a substantial preference under the diversification criterion.

2. The proceeding involves the applications of Voice of Dixie, Inc. (Voice)[1] and First Security and Exchange Company (First Security) for construction permits for a new Class C FM broadcast station to operate on Channel 258 in Birmingham, Alabama. The mutually exclusive applications were designated for hearing by Order, FCC 69–980, released September 17, 1969, under limited financial and *Suburban* issues directed to each applicant, and a standard comparative issue.[2] The record was initially closed on April 6, 1970, after hearing had been concluded on all issues other than the community needs issue; sub-

[1] On March 1, 1973, a petition to deny the license renewal application of AM Station WVOK, licensed to Voice, was filed by the Birmingham Chapter, Human Relations Council of Alabama; however, in view of our disposition herein, the significance of this action need not be explored.

[2] The application of Basic Communications, Inc. was also designated for hearing at that time; however, that application was subsequently dismissed by Order, FCC 70R–18, released January 21, 1970.

sequently, following issuance of the Commission's *Primer on Ascertainment of Community Problems*, *supra*, further proceedings were conducted through the exchange of written testimony and the record was again closed by Order, FCC 71M–951, released June 11, 1971.[3] Thereafter, the Administrative Law Judge, Frederick W. Denniston, issued an Initial Decision (FCC 71D–63, released September 17, 1971) recommending a grant of the application of Voice; this conclusion was premised on the Judge's determination, after favorably resolving the outstanding *Suburban* and limited financial issues against each applicant, that Voice's substantial preference under the best practicable service criterion of the standard comparative issue outweighs the substantial preference accorded First Security under the diversification criterion. First Security seeks reversal of the decision; Voice has filed limited exceptions.

3. The Review Board has considered the Initial Decision in light of the exceptions and briefs, its examination of the record and the arguments of the parties.[4] The Presiding Judge's findings of fact are thorough and accurate in most significant respects. Consequently, except as modified herein and in the rulings contained in the attached Appendix, the Presiding Judge's findings of fact are adopted. Although the Board does not agree with the Judge's resolution of the comparative issue, the Board is in full agreement with the ultimate conclusions reached with respect to the financial and *Suburban* issues directed against both applicants. However, in light of the extensive arguments advanced, some amplification and/or modification of the Judges' supporting conclusions concerning First Security's community needs showing is required.[5]

SUBURBAN ISSUE

4. Although First Security's efforts to ascertain the needs and interests of its coverage area are far from optimum, the showing nevertheless, substantially comports with the intent and purpose, as well as the fundamental objectives, of the *Primer*.[6] Of primary importance is the fact that the totality of the record accords reasonable assurance that the applicant: (a) as discussed *infra*, consulted community leaders who are representative of a broad cross-section of significant population groupings; and (b) established a dialogue with such community leaders. Thus, a broad cross-section of community problems are identified and programs are designed to relate to the significant community needs as evaluated by the applicant. As will be discussed in the following paragraphs and in the attached rulings on Exceptions, there are a number of weaknesses—of varying significance—in the applicant's *Suburban* showing; however, it is our judgment that the cumulative

[3] By further Order, released September 7, 1971, the record was reopened to receive an amendment to Voice's application; the amendment was accepted and the record re-closed.

[4] Oral argument was held before a panel of the Review Board on February 22, 1973.

[5] The limited financial issues directed to each applicant were based on deficiencies in the initial applications; as found and adequately documented by the Presiding Judge these deficiencies have been cured by the applicants' record showings. Similarly, the Presiding Judge's findings and conclusions concerning Voice's *Suburban* showing are thorough and accurate in all significant respects. Accordingly, the Board is of the view that no basis exists for disturbing the Judge's findings and conclusions under these issues.

[6] *Cf.* the Board's decision in *Media, Inc.* (Docket No. 18768), adopted simultaneously on the same date as the subject decision.

effect of these weaknesses is not sufficient to warrant disqualification under this issue. As an initial matter, we do not agree with Voice that First Security's entire showing is invalid because the applicant did not make a detailed demographic showing prior to the selection of the community leaders who were interviewed, and/or did not interview any community leaders subsequent to or as a result of the demographic material it ultimately compiled and submitted to the Commission. While the *Primer*[7] recommends that an applicant use demographic information in order to select those who are to be consulted as representative community leaders and clearly that approach is preferable, this preliminary community analysis is not strictly required, if the totality of the evidence establishes an applicant's reasonable awareness of significant population groups, their respective community leaders, and their community problems.[8] Then, what is of primary significance is that the applicant's consultations with such community leaders establishes the required dialogue; when all of this is done, the purpose of the *Primer* is satisfied, regardless of whether or not the supporting demographic data was compiled before or after the actual surveys. Thus, although First Security's demographic showing suffers in comparison with that of Voice, we believe that First Security has compiled a showing which—in conjunction with its community leader survey—is adequate to indicate (a) the minority, racial or ethnic breakdown of the community, its economic activities, public service organizations, as well as other factors and activities which serve to make Birmingham distinctive, and (b) the applicant's establishment of a dialogue with community leaders from all of the significant groupings of its population. (See question and answer 9 of the *Primer*.)

5. In this connection, Voice further contends that First Security failed to consult with representatives of two significant groups, the two largest employers of Birmingham (the iron and steel industry and the educational medical complex at the University of Birmingham). However, the record establishes that the applicant did consult with community leaders who are generally representative of employers in the community. In our view, Voice has not shown why such consultations with these other employers would not be adequate.[9] In sum, there is no basis for concluding that these particular consultations would have been fundamental to First Security's showing. Similarly, the fact that First Security did not conduct any consultations in Tuscaloosa, a major urban concentration allegedly within its service area, does not make the showing defective; as shown by Voice Exhibit 12, Figure 1, the applicant's proposed 1.0 mv/m contour would reach only a small portion of Tuscaloosa (even though it is located only 50 miles from the transmitter site);[10] in the Board's view, therefore, the city cannot be considered an integral portion of First Security's service area, thereby bringing the requirements of the *Primer* into play in this respect.[11]

---

[7] See *Primer*, questions and answers 9 and 10.
[8] See *Phil D. Jackson*, 33 FCC 2d 928, 23 RR 2d 1023 (1972).
[9] See question and answer 10 of the *Primer*.
[10] First Security and Voice both propose the same transmitter site; additionally, it was stipulated that both applicants have identical service contours.
[11] The *Primer* states that if an applicant chooses not to serve a major community *within* its service contour, it must present a showing explaining why (see question and answer 6 of the *Primer*).

6. Question and answer 11(a) of the *Primer* requires that consultations with community leaders be conducted by principals, or by prospective or actual management-level employees. In the *Report and Order*, adopting the *Primer*, the Commission undertook to define "top-level" employees as "those whose position is high enough in the organization to be an effective voice in the decision-making process." The stated purpose of this requirement is to insure "that a dialogue can be established and maintained between the community and the decision-making personnel of the applicant." Given this explanation of clear Commission intent, the Board cannot agree with Voice's assertion that the bulk of First Security's community leader consultations were not conducted by appropriate persons.[12]

7. Sumner G. Stewart-Magee, who conducted 25 consultations, qualifies on either of two grounds; he is both a prospective management-level employee, and an officer and director of the applicant. According to First Security's proposal, Stewart-Magee, although a part-time employee, will be responsible for the financial interests and community relations of the station, as well as for overseeing the station's programming; these responsibilities, we believe, denote decision-making responsibility. In any event, Voice has advanced no argument which would persuade us to depart from drawing the customary inference that one who is an officer and director of an applicant holds appropriate responsibility to conduct a community leader survey.[13] Compare *Childress Broadcasting Corporation of West Jefferson (WKSK)*, 37 FCC 2d 766, 25 RR 2d 711 (1972).[14] Nor are we persuaded by Voice's argument that Mr. Neal Miller, who conducted the balance of community leader surveys, does not qualify as a *bona fide* prospective management-level employee. Although Miller's association with the applicant has not been definitely settled, and any negotiations looking toward his employment appear to be at a preliminary stage, the uncontroverted testimony of Edward P. Ellis, president and owner of the applicant, and Stewart-Magee, indicates that Miller is considered to be the proposed general manager of the station. No evidence adduced at hearing indicates anything other than good faith on the part of Ellis and Stewart-Magee; nor has any evidence been adduced which could serve to controvert the representations of these men. One final matter remains to be considered; Voice, noting that First Security and Miller have not settled on the precise terms of Miller's future employment, urges that some more definitive form of agreement is requisite to finding that Miller is, in fact, a prospective employee. While an agreement as to terms would be preferable, such a requirement would, in our view, be unnecessarily stringent as a practical matter, particularly when, as in the circumstances here, there is

[12] Voice is correct in asserting, however, that three other persons, who collectively interviewed 21 community leaders, do not meet the requirements set forth in question and answer 11(a) of the *Primer*.

[13] First Security's survey of the general public was conducted by Mr. and Mrs. Stewart-Magee. The *Primer* requires that these interviews be conducted by, or, alternatively, supervised by, principals, management-level employees or prospective management-level employees; consequently, those interviews conducted by Stewart-Magee constitute a valid and adequate public survey. (See question and answer 11(b) of the *Primer*.)

[14] In that case, the Board held that the customary inference was rebutted, and that an officer and director of an applicant was appointed to these positions solely for the purpose of securing compliance with the requirements of the *Primer*, and not to really fulfill responsibilities of those offices.

no certainty that the applicant corporation will receive a grant. Under these circumstances, we believe that the sworn testimony of the applicant's officers, directors and its principal stockholder here accords reasonable assurance of Miller's employment.

COMPARATIVE ISSUE

Best Practicable Service Integration of Ownership and Management

8. First Security warrants, at best, only minimal credit for integration of ownership into management, because its non-resident owner does not plan to move to Birmingham and he would devote on the average no more than one day a week to the proposed FM station. The *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 at 395, 5 RR 2d 1901 at 1909 (1965), provides that "no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis." The only exceptions to this are "slight credit" for part-time participation by a local resident owner and "very slight credit" for part-time participation by an owner with broadcast experience. Mr. Ellis qualifies for neither exception. Furthermore, there appears to be some uncertainty with respect to Ellis' precise policy and management functions; rather, the significant management role appears to be that of the proposed general manager.

9. Voice, licensee of AM Station WVOK, Birmingham, Alabama, is owned by the Benns and Brennan families on a 50–50 basis. Iralee W. Benns and William E. Benns, Jr., each own 25% of Voice; the remaining 50% of the applicant is owned by Mary S. Brennan. The Presiding Judge concluded that the "major portion" of Voice's ownership would be integrated into the daily management of the proposed FM and existing AM stations by local residents of the community with extensive records of community involvement and broadcast experience. In reaching this conclusion, the Judge credited the 50% ownership interest of Mary S. Brennan, which he imputed to her son Daniel M. Brennan (who is a director and proposed full-time program director of the applicant) and the 25% ownership interest of Iralee W. Benns. The Judge concluded that Voice could receive no integration credit, however, for the part-time, non-resident participation of Mary S. Brennan and William E. Benns, Jr.

10. Our major disagreement with the Presiding Judge's resolution of this aspect of the comparative issue rests with his failure to conclude that only those persons with an ownership interest may be considered in evaluating Voice's integration proposal. Rather, relying upon *Cleveland Broadcasting, Inc.*, 7 FCC 2d 680, 9 RR 2d 941 (1967), set aside 12 FCC 2d 1008, 13 RR 2d 156 (1968),[15] the Administrative Law Judge credited Daniel Brennan with the 50% ownership interest of his mother, Mary Brennan. Admittedly, the record of 50–50 ownership and operation of Station WVOK by the Benns and Brennan families dates back more than twenty years. However, this joint operation has been but one of a number of cooperative broadcast enterprises, which have involved various members of both families in a shifting and interchangeable mosaic of business relationship

and management positions.[16] These circumstances are clearly distinguishable from the ongoing and cohesive family pattern established in *Cleveland*.[17]

11. In any event, even if Daniel Brennan were to be credited with 50% integration, we believe, contrary to the Presiding Judge's conclusion, that Voice could be accorded no more than moderate credit in this regard, because of the limited extent to which Voice's other owners would be meaningfully integrated into the management of the proposed facility. According to the record evidence, the actual ownership of Voice would be integrated into management as follows: (a) Iralee Benns, as president, general manager and 25% owner of Voice, would participate in the operation of the proposed stations somewhat more than half-time on a daily basis (approximately 24 hours a week). Although the division of effort between the AM and proposed FM stations would result in some diminution of her purported integration,[18] Mrs. Benns' integration would be qualitatively enhanced because of her past broadcast experience, local residence and past participation in civic affairs. On balance, therefore, her proposed participation merits a slight to moderate credit. (b) William E. Benns, Jr., as secretary-treasurer, director and 25% owner of Voice, would devote one day a week to the combined AM–FM operation. According to the *Policy Statement*, *supra*, Benns is entitled to slight credit as a local resident who would devote part-time to the operation of the station. The division of efforts again would require some diminution of this credit, but this may well be balanced by Benns' past broadcast experience. (c) Mary Brennan, vice president, music director and 50% owner, would not participate in the day-to-day operation of the proposed station. Moreover, since she is not a resident of Birmingham, no credit should, or in the Board's view, be awarded for her proposed participation.

Duplication of Programming

12. First Security proposes independent programming, whereas Voice would duplicate a portion of its WVOK programming over the proposed FM station. The duplication would occur Monday through Friday, from 12:30 p.m. to 2:00 p.m. and from 4:30 p.m. to sign-off of WVOK. As WVOK is a daytime-only station, its sign-off varies from 4:45 p.m. to 8:00 p.m., depending on the season of the year; this would result in duplicated programming over the FM

[15] In *Cleveland Broadcasting, Inc., supra*, the Board credited a full-time combined operation participant (as well as vice president, director and member of the executive committee of the company) as representing the controlling 40% ownership interest of his family, rather than representing merely his own nominal one percent interest. The Board, noting the impressive and ongoing (20 years) participation of other family members stated: ". . . there are no indications whatsoever that the individuals comprising this group are not a firm and staunch family union 'working' together in connection with their common broadcast interests."

[16] See, *e.g.*, paragraphs 91–93 of the Initial Decision.

[17] Also, compare a subsequent Review Board Decision, *Triple C Broadcasting Corporation*, 16 FCC 2d 357, 15 RR 2d 515 (1969), review denied FCC 69–1057.

[18] In this connection, as First Security correctly notes, the Administrative Law Judge failed to find that the various members of the Benns and Brennan families would be dividing their efforts between WVOK and the proposed FM station. As a result, some diminution of the quantity of integration credit is warranted. *Community Broadcasting Service, Inc.*, 2 FCC 2d 53, 6 RR 2d 589 (1965). However, since the FM station would duplicate between approximately 7% and 19% of the programming of the daytime-only AM station, and they would share the same studio, the division of time would not be substantial.

109-045—73——12

facility ranging from a maximum of 18.8% in the summer to 6.6% in the winter. No AM programming would be duplicated on Saturday or Sunday. In support of its argument that a comparative demerit should not be assessed because of this duplication, Voice asserts: (1) that the duplicated programs are of unusual merit; (2) music of special appeal will be provided; and (3) economy of operation will result.

13. In the Board's view, Voice has failed to show that the benefits which would flow from its duplicated programming offset the inherent disadvantages; accordingly, Voice must be assessed a demerit because of its proposed part-time duplication of programming. As properly concluded by the Administrative Law Judge, the argument that duplication would result in economy of operation is not adequately supported, and, in any event, has not been shown to be a public interest factor. Secondly, none of the three programs alleged to be of particular merit—with the possible exception of the twice-to-be duplicated "Voice of Dixie"—have been shown to be of such merit. The applicant has not shown that the "Southern Farm Review", even assuming it is a unique programming service, is of particular value because it is broadcast during the noontime period. Also, the argument (with respect to "Hal's Swap Shop" and musical programming of special youth appeal) essentially is no more than an assertion that the FM would provide better sound quality to a smaller coverage area than the existing AM Station WVOK. Since Voice warrants a comparative demerit for its limited duplication, Voice may be accorded, at most, a moderate preference under the best practicable service standard.

Diversification of Control of Mass Media

14. Neither First Security nor its principal has any ownership or other interests in any broadcast station or any other form of mass media communication. In contrast, both Voice and several of its principals have other broadcast interests. The most significant interests are:

(a) Voice is the licensee of daytime-only Station WVOK, Birmingham, Alabama;

(b) Iralee W. Benns is president, director and 43% stockholder in WFLI, Inc., licensee of Station WFLI, Lookout Mountain, Tennessee; and

(c) William E. Benns, Jr., is treasurer and director, and since March 25, 1970, has been a 48% stockholder in WFLI, Inc.

Based on these facts, it is clear that First Security warrants a substantial preference under the diversification criterion. In our view, the critical fact is that Voice is currently the licensee of daytime-only Station WVOK. In this connection, the Board notes that the Commission's policy of encouraging licensees of daytime-only AM stations to acquire affiliated FM facilities, although a factor to be considered, is not a valid basis for disregarding such ownership in a comparative evaluation of applicants. See *Blancett Broadcasting Co.*, 17 FCC 2d 227, 15 RR 2d 1349 (1969), and the cases cited therein.

Thus, while the weight of the diversification preference accorded First Security is somewhat mitigated by the fact that Voice is seeking to build a companion FM service, First Security nonetheless warrants a substantial preference (even though there is a plethora of service in Birmingham and the surrounding area) because First Security would constitute a new "voice" in the principal community. This preference is further enhanced because of the almost total ownership of WFLI, Lookout Mountain, Tennessee, by owners of 50% of the applicant, and the fact that there is some overlap between that station and WVOK.

CONCLUSION

15. The question thus presented in this proceeding is whether an applicant which has merited a substantial diversification preference, or an applicant which is entitled to a moderate preference under the best practicable service aspect of the comparative issue, should prevail. Given the circumstances discussed above, the Board believes that First Security must be favored in the comparative evaluation. It is clear that diversification is one of the two primary objectives towards which the comparative process is devoted, and in view of the different margins of credit accruing to each applicant, *i.e.*, a substantial preference for diversification versus a moderate preference under the best practicable service criterion, First Security's comparative proposal is to be preferred over that of Voice. See *Snake River Valley Television, Inc.*, 26 FCC 2d 380, 20 RR 2d 644 (1970).[19] Accordingly, it is the Board's view that the public interest, convenience and necessity would best be served by grant of the application of First Security and Exchange Company.

16. Accordingly, IT IS ORDERED, That the Application of First Security and Exchange Company (File No. BPH-6610) IS GRANTED, and the application of Voice of Dixie, Inc. (File No. BPH-6449) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
SYLVIA D. KESSLER, *Member, Review Board.*

APPENDIX

RULINGS ON EXCEPTIONS OF FIRST SECURITY & EXCHANGE CO.

Exception No.	*Ruling*
1	Granted to the extent that, according to Voice's proposal, Iralee Benns would devote the same amount of time she now devotes to Station WVOK (about 24 hours a week) to the proposed AM–FM combination, and denied in all other respects inasmuch as the Presiding Judge's findings accurately and adequately reflect the record.
2	Granted in substance. See paragraph 9 of this Decision.
3, 6, 8, 9, 10, 11, 15, 16, 29.	Denied as not decisionally significant.

[19] Voice's reliance on *East St. Louis Broadcasting Corporation*, 29 FCC 2d 170, 21 RR 2d 992 (1972), is misplaced: in that case, the Commission held that grant of an application with a significant preference for best practicable service (based upon a moderate preference for integration) would better serve the public. The competing applicant had been accorded a substantial preference for diversification which was diminished because of a substantial demerit flowing from its unusually poor broadcast record.

Exception No.	*Ruling*
4	Granted to the extent that, according to Voice's proposal, William E. Benns, Jr., would devote the same amount of time he now devotes to Station WVOK (one day a week) to the proposed combined AM–FM operation, and denied in all other respects inasmuch as the Presiding Judge's findings accurately and adequately reflect the record.
5	Denied. Paragraph 76 of the Initial Decision accurately and adequately reflects the record.
7	Granted. Daniel Brennan stated at hearing that he was not sure whether there are other stations in Voice's coverage area which broadcast agricultural information during the noon hour. (Tr. 53–54.)
12, 14, 17, 18	Denied. The Presiding Judge's findings accurately and adequately reflect the pertinent facts of record.
13	Granted to the extent that the 0.5 mv/m contours of WVOK and WBAM overlap in 9,221 square miles containing 240,367 persons, and denied in all other respects as not decisionally significant.
19	Denied. Although First Security urges that Voice should receive a demerit for its alleged poor broadcast record, we agree with Voice that First Security's showing in this regard is both procedurally and substantively deficient.
20, 25	Granted in substance for the reasons stated in this Decision.
21	Granted. See paragraph 8 of this Decision.
22, 23, 26, 27	Granted to the extent indicated in this Decision, and denied in all other respects as unsupported by the record evidence.
24	Granted to the extent indicated in paragraphs 8–11 of this Decision, and denied in all other respects as not supported by the record.
28	Granted. The First Security proposal would best serve the public interest, convenience and necessity.
1	Granted. The detailed demographic information submitted by First Security was not submitted until May, 1971, subsequent to the completion of all of First Security's interviews with community leaders. See also paragraph 4 of this Decision.
2	Granted to the extent indicated in paragraph 4 and 5 of this Decision and ruling on exception 1, supra, and denied in all other respects as unsupported by record evidence.
3	Granted. 25, rather than 32, of the community leaders consulted were located in the small towns and rural areas that compose the proposed service area.
4	Denied. While contacts with community leaders representing such groups as "youth" and the "aged" is required, the age distribution of community leaders, per se, is irrelevant.
5	Denied. First Security attempted to bolster its showing with regard to its community leader survey efforts by listing—in most instances—a number of groups with which each person was associated; thus, Voice's exception, alleging that First Security failed to identify all community leaders with sufficient specificity is somewhat misleading; although the applicant did not give the position of each leader in each and all community groups credited to him, there does appear to be sufficient identification of each person to satisfy the requirements of the Primer.

Exception No.	*Ruling*
6	Granted to the extent indicated in paragraph 7 of this Decision, and denied in all other respects as contrary to the record evidence.
7, 8	Denied. Although First Security's programming proposal is not sufficiently specific with regard to anticipated time segments, there is some indication of time segment and the proposal is specific with respect to description, duration and frequency of broadcast of the program or program series, and the community problem or problems which are to be treated by it. Thus, we believe the programming proposal substantially complies with question and answer 29 of the *Primer*. Also compare *Cosmos Broadcasting Corp.*, 31 FCC 2d 200, 22 RR 2d 723 (1971), upon which Voice relies.
9	Denied. See paragraph 7 of this Decision.
10	Granted. See paragraph 6 of this Decision.
11	Denied. The Judge's ruling which excluded eight pages of Voice Exhibit No. 15 from evidence on the grounds of irrelevancy (Tr. 131) will be sustained; the ruling properly excluded evidence which concededly did not relate to Voice's direct case.
12	Denied for the reasons stated in this Decision and elsewhere in the rulings on exceptions.
13	Granted to the extent indicated below, and denied in all other respects for the reasons stated in paragraph 6 of this Decision. Because Mr. Steward-Magee does not have any ownership interest in First Security, his proposed participation in station operations does not have any bearing on the integration proposal of the applicant.
14	Granted. The prime interest rate changed by major New York banks at the time of hearing was 8½%.
15, 16, 18	Denied as not decisionally significant.
17	Denied. The Presiding Judge concluded that neither former or future broadcasting interests are relevant to the diversification evaluation.
19	Denied. This exception is based upon a misreading of paragraph 102 of the Initial Decision.
20	Denied for the reasons stated in paragraph 13 of this Decision.

F.C.C. 71D-63

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of VOICE OF DIXIE, INC., BIRMINGHAM, ALA.	Docket No. 18664 File No. BPH-6449
FIRST SECURITY & EXCHANGE CO., BIRMINGHAM, ALA.	Docket No. 18666 File No. BPH-6610
For Construction Permits	

APPEARANCES

S. White Rhyne, Jr., Esq., and *Eugene F. Mullin, Esq.*, on behalf of Voice of Dixie, Inc.; *Morton L. Berfield, Esq.*, on behalf of First Security and Exchange Company; and *Earl C. Walck, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER FREDERICK W. DENNISTON

(Issued September 14, 1971; Released September 17, 1971)

PRELIMINARY STATEMENT

1. This proceeding involves the applications of Voice of Dixie, Inc. (hereinafter "Voice") and First Security and Exchange Company (hereinafter "First Security") for construction permits to construct and operate an FM broadcast station on Channel 258 assigned to Birmingham, Alabama. Because of the mutually exclusive nature of the proposals, the Commission, by Order (FCC 69-980, released September 17, 1969), designated the applications, together with the application of Basic Communications, Inc. for a similar facility at Birmingham,[1] for hearing in a consolidated proceeding on various issues. The application of Basic Communications, Inc. was dismissed by the Review Board upon the joint petition of Basic and Voice (21 FCC 2d 340). The surviving issues applicable to the two remaining applications are as follows:

1. To determine whether Voice of Dixie has available to it the additional $53,200 required for construction and first-year operation without reliance on revenues to thus demonstrate its financial qualifications.

3. To determine whether First Security and Exchange has available to it the additional $7,800 required for construction and first-year operation without reliance on revenues to thus demonstrate its financial qualifications.

4. To determine the efforts made by Voice of Dixie to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

---

[1] Docket No. 18665, File No. BPH-6476.

6. To determine the efforts made by First Security and Exchange to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine in the light of the evidence adduced pursuant to the foregoing issues, which, if any, of the applications for construction permit should be granted.

2. A prehearing conference was held on October 31, 1969, and hearing sessions were held on February 10 and 11, March 18, and April 6, 1970, on all issues other than the community needs issue (Issues 4 and 6). The record was closed on the latter date.[2] Subsequently, following issuance of the Commission's so-called *Primer* on the community survey issue, 27 FCC 2d 650, further proceedings were conducted herein through the exchange of written testimony without further hearings, and the record again was closed by order released June 11, 1971 (FCC 71M–951). The applicants filed proposed findings of fact and replies to each other's filing; the Broadcast Bureau submitted proposed findings on the financial issue (Issues 1 and 3).

FINDINGS OF FACT, ISSUES 1 AND 3 (FINANCIAL)

Issue No. 1—Limited Financial Issue Directed to Voice

3. In the Designation Order, the Commission found that Voice would require approximately $78,200 to construct and operate its proposal for one year without reliance on revenues, and that this need (which includes interest on a bank loan) is to be met by cash on hand of $25,000 and a bank loan for $85,000. The Commission pointed out that although the bank appeared willing to make the loan, the bank letter failed to specify the terms of repayment, and it therefore added the issue to determine the availability of the additional $53,000 which is required without reliance on revenues.

4. Voice has an $85,000 bank loan commitment from the Exchange Security Bank, Birmingham, Alabama, set forth in three letters by Lawrence M. Shaffield, Executive Vice President of the Bank, addressed to Voice. Collectively, these letters assure the availability of the $85,000 loan. The principal terms and conditions are:

(a) The proceeds of the loan will be used in connection with the construction and operation of an FM radio station to be located in Birmingham.

(b) Interest rate shall be 1% above the prime rate charged by the major New York banks at the time the loan is effected.

(c) Interest only is to be paid monthly for the first twelve months.

(d) Interest and amortization of the entire amount, during the next 24 months.

(e) A first mortgage on designated real estate occupied by Voice is required as collateral, and also personal endorsements of Iralee Benns and Mary Brennan, principal owners of Voice.

---

[2] By further order, released September 7, 1971, the record was reopened to receive an amendment to the Voice of Dixie application, the amendment was accepted, and the record reclosed.

5. Voice's property, on which the Bank would require a first mortgage as collateral security for the loan, is unencumbered. Voice has presented statements signed by Iralee W. Benns and Mary S. Brennan committing themselves to personally endorse the loan obligation, as required by condition (e) above.

6. Voice submitted a balance sheet as of November 30, 1969, reflecting total assets of $161,433.78 upon adjustment for accountant's error,[3] and a net worth of $142,274, of which approximately $25,000 (the two bank accounts) is liquid (Voice Exhibit No. 13 adjusted for accountant's error).

7. Iralee W. Benns, President of Voice, has promised to lend Voice from her personal funds, in the event that additional funds are needed, up to $15,000 for a term of eighteen months, with no repayment of principal until the maturity of the loan, and with payment of interest at 8% per year in monthly installments. Mrs. Benns represented she has liquid assets well in excess of $15,000 more than all her debts and liabilities, but she did not submit a balance sheet or financial statement making a definitive showing.

Issue No. 3—Limited Financial Issue Directed to First Security

8. In the Designation Order the Commission found that First Security would require $77,800 to construct and operate its proposed facility for one year without reliance on revenues. The Commission pointed out that to meet this requirement First Security relies on municipal bonds totalling $20,000 and a bank loan for $50,000, and specified an issue (No. 3) to determine whether First Security has available to it the additional $7,800 required for construction and first-year operation without reliance on revenues, to demonstrate its financial qualifications.

9. First Security has a $100,000 loan commitment from the Georgia Savings Bank and Trust Company, Atlanta, Georgia, the terms and conditions of which are set forth in two letters by R. E. Gormley, President of the Bank, addressed to First Security. The letter of November 19, 1969, reads as follows:

"We understand that First Security and Exchange Company has filed an application with the Federal Communications Commission for authority to construct and operate a new FM broadcasting station in Birmingham, Alabama. In the event that First Security and Exchange Company is awarded this authorization, this bank will lend the corporation up to $100,000.00 for a period of five (5) years, bearing interest at the rate of 8%, subject to adjustment with basic prime conditions. No payment of principal will be required until one year after the station commences operation. The collateral for the loan will be the personal endorsement of Edward P. Ellis and such security as this bank shall require from time to time. The loan, of course, will be subject to the execution of a loan agreement."

A supplementary letter, dated February 6, 1970, reads as follows:

"To clarify the commitment letter to you of November 19, 1969, you are advised that the subject loan by this bank to First Security and Exchange Com-

[3] Through accountant's error the "Merrill Lynch" account in the balance sheet was shown as $48,139.90 instead of $21,776.00. Correction of this error reduces Voice's total assets from $187,797.68 to $161,433.78.

pany as set forth therein must be secured by the personal endorsement of Edward P. Ellis. In addition, should the bank deem it necessary at any time during the term of the loan, this bank will require the assignment of fifty (50) shares of the common capital stock of this bank now owned and registered in the name of Edward P. Ellis as security for repayment. Subject to the foregoing clarification, the commitment letter to you of November 19, 1969, is confirmed."

Mr. Ellis will endorse the loan obligation and assign his bank stock as referred to in the bank's letters of November 19, 1969, and February 6, 1970.

10. Edward P. Ellis, referred to in the letters, is the President, Treasurer, and a Director of First Security. He personally owns 80% of the stock of First Security, and votes the remaining 20% which is held in trust, the beneficiary being Mr. Ellis' minor daughter, Harriet C. Ellis. In addition to having an ownership interest in the Georgia Savings Bank and Trust Company, Mr. Ellis is also a Director of the Bank.

CONCLUSIONS ON FINANCIAL ISSUES

11. The limited financial issues directed to each applicant were based on deficiencies in the applications. Those deficiencies have been met by the foregoing showing, and the Broadcast Bureau has proposed that each applicant be found to be financially qualified. The facts fully justify that recommendation and it is so found.

FINDINGS OF FACT, ISSUES 4 AND 6 (COMMUNITY NEEDS SURVEY)

Issue No. 4—Voice of Dixie

12. In ascertaining the needs of its proposed service area, Voice relied in part on its more than twenty years' experience as a broadcaster in the area, being licensee of WVOK, an AM station in Birmingham. During all this time, its President and General Manager, and its Program Director, have been continuously with the station and have lived in Birmingham or vicinity.

13. These two have been involved on a day-to-day basis with the people of the area and their problems. They have gained an intimate familiarity with Birmingham and surrounding communities, and with the concerns of the residents of those communities.

14. Voice has also followed the issues and problems in the station's service area through regular newscasts, through attention to the newspapers and other media of communication and through conversations with listeners and local leaders. It has adhered to a policy of consulting and cooperating on a regular basis with governing bodies and officials, law enforcement organizations, educational institutions, agricultural agencies, and civic, cultural, religious and business groups.

15. During the latter part of 1969 and the early part of 1970, Voice conducted daily on-the-air discussions with carefully chosen area leaders on matters of community interest and concern. These fifteen-minute Monday through Friday programs were part of a series entitled "Voice of Dixie." They developed a number of views and opinions on community needs. Ideas expressed by participants suggested questions put to subsequent participants, and in some instances pointed the way to other subjects for subsequent interviews. Voice drew on

the information and suggestions in these radio discussions in ascertaining community needs and problems.

16. In its ascertainment of community needs, Voice did not rely exclusively on its knowledge of the area as a licensee, on the long-time residence of its General Manager and Program Director in the area, or on its regular public affairs programming. It also conducted a demographic study of Birmingham and surrounding service area, and on the basis of the composition of the community thus established it selected a representative group of local leaders for specific inquiry into community problems.

17. Voice established the demographics of the area through discussions with representatives of the Birmingham Chamber of Commerce, the Department of Public Health and the Birmingham Council on Religious Education. It referred to United States census data on Birmingham, on Jefferson County, and on other counties in northern Alabama. It consulted the Annual Report of the Jefferson County Public Health Department, miscellaneous reference materials at the Birmingham Public Library, and publications of the Birmingham Chamber of Commerce and the Birmingham Post-Herald newspaper.

18. Birmingham is a major center of manufacturing, of which the principal industry is iron and steel. The city is surrounded by large rural regions, in which agriculture is important. It is located in Jefferson County, Alabama, which includes the Birmingham suburbs where most of the recent population growth has occurred. However, the proposed FM service area includes also all of Shelby County, Alabama; substantial portions of eight other counties; and minor portions of still five others.

19. A portion of Tuscaloosa, population 65,773, lies within the contours of the proposed station, and is the seat of the University of Alabama. There is also a major campus of the University of Alabama in Birmingham, which covers twenty blocks just south of the city's central business area and has become one of the area's largest industries. The Medical Center of the University is the city's second largest employer, ranking behind only U.S. Steel.

20. Except for Jefferson County and Tuscaloosa County, which are predominantly urban, the rest of the proposed service area is largely rural. Each of the five counties immediately adjacent to Jefferson, excluding Tuscaloosa County, is 75% or more rural according to 1970 census figures.

21. The percentage of Negro population in Birmingham is 42%—the highest percentage of blacks in any of the six largest cities in Alabama. The percentage of Negroes in Jefferson County as a whole is only 32%, and in the outlying counties is even less. Persons classified by the census as "other" than white or Negro are minimal in the area. There are even fewer native born residents of foreign parentage.

22. Religious activity is of great importance in the Birmingham area, with the greatest membersip in a single denomination by far being Baptist. Birmingham is also the home of Samford University, Baptist affiliated, which is the largest privately supported and fully accredited coeducational institution of higher learning in Alabama. The

next largest religious groups after the Baptists are the Methodists and Catholics, and then the Presbyterians.

23. Birmingham has the highest percentage of homeowners in the southeast among cities of comparable size. It has 3,100 women with paid memberships in the General Federation of Women's Clubs, some 153 clubs affiliated with the organization, and numerous other unaffiliated clubs. For this reason, it is sometimes called the "Club Capital of the World."

24. Voice conducted interviews of 86 local leaders regarding community needs and problems. Forty-three interviews were conducted prior to the Commission's release of the interim "Primer" on December 19, 1969. While not made with the benefit of the guidance in the "Primer," they were nonetheless focused primarily on community problems. An additional 28 local leaders were interviewed during this period about specific problems within their areas of interest, as part of a public affairs discussion feature on Voice's AM radio station entitled "Voice of Dixie." Three of the 43 leaders originally interviewed also appeared on "Voice of Dixie," the AM station.

25. Subsequent to issuance of the interim "Primer," Voice interviewed ten additional leaders, and reinterviewed three leaders with whom it had previously consulted.

26. Following issuance by the Commission in February 1971 of the "Primer" in final form, Voice interviewed five additional community leaders, and reinterviewed two leaders whom it had previously consulted.

27. Included among the total interviews were representatives of the iron and steel industry—both management and labor—and also representatives of agriculture.

28. There were many community leaders from Birmingham itself and from the Jefferson County suburbs, such as Bessemer, Fairfield, and Midfield.

29. There were also a number of leaders from communities in the more distant portions of the proposed service area. These were persons who held positions which gave them a broad overview of the problems of their particular communities. They included the Mayors of Clanton, Sylacauga, Oneonta, Talladega, Cullman, Columbiana, Calera, Tuscaloosa, and Pell City. They also included a City Councilman in Jemison and the Chief of Police of Centerville.

30. Voice interviewed representatives of the faculty administration and student body at the University of Alabama in Birmingham. It also interviewed the Executive Vice President of the University of Alabama at its Tuscaloosa Campus and various representatives of other area educational institutions.

31. Among the community leaders interviewed by Voice were a number of prominent leaders of Birmingham's substantial black population. These included one of the city's most successful businessmen, a local newspaper publisher, a dentist and officer of the local NAACP, another NAACP official, the President of Miles College, a member of the Birmingham City Council, a local pastor who serves as President of the 200 member Birmingham Baptist Ministers' Conference and Secretary of the 450,000 member "Black Baptists of Ala-

bama," the Executive Director of the Birmingham Urban League, and a black Health Educator.

32. Voice interviewed a number of representatives of the religious community, including several prominent Baptists, the President and the Director of Development of Birmingham's Baptist-sponsored Samford University, the Bishop of the Roman Catholic Diocese of Birmingham, Methodists, and Presbyterians.

33. Voice interviewed women leaders as well as men. It spoke with the President of the Birmingham Chapter, American Business Women's Association, the District Director of the Alabama Federation of Women's Clubs, the Vice President of Student Government at the University of Alabama, Birmingham, and other women in leadership positions.

34. The interviews encompassed senior citizen leaders, and youth leaders both at the college level and in high school.

35. They included businessmen, political figures, representatives of the sports world, culture and the arts, fire and police officials, other government officials, representatives of eleemosynary organizations, and leaders with special interests in the fields of health, recreation, and transportation.

36. All interviews of community leaders by Voice were conducted under the supervision and direction of Daniel M. Brennan, a corporate director of Voice, Program Director of its AM station WVOK, and second-in-command to the General Manager at the station. He personally interviewed 25 of the community leaders. Fifty others were interviewed by two other management level employees of Voice at WVOK—Mr. Harold G. Hodgens, the National Sales Manager and News Director; and Mr. James R. Romine, the Sports Director.

37. Each of the 11 remaining community leaders, who were interviewed only by other station employees, were seen prior to the issuance of the "Primer"—in which the Commission for the first time enunciated the requirement that interviews of community leaders be conducted by "principals" or "top-level" [later "management level"] employees. However, Mr. Brennan discussed each such interview with the Voice representative who had conducted it, and he prepared or reviewed the written description of the interview which became a part of the evidence in this proceeding.

38. Likewise, the record demonstrates that each of the Voice interviews of community leaders which took place after the Commission instituted the six month requirement in the Primer, took place within six months prior to filing with the Commission. This was also true of all earlier interviews.

39. In addition to the 86 community leaders consulted by Voice, interviews were conducted with 103 members of the general public. These contacts were made by telephone. The selection of names from the telephone directory was completely at random, and none of the persons called was known to Voice or to the interviewee who placed the call.

40. The members of the general public who were called included persons who lived in Birmingham itself, persons in the Jefferson County suburbs of Birmingham, and persons living beyond the borders

of Jefferson County in the FM service area. Some of those in the outlying areas were farmers.

41. Forty-five of these contacts were made subsequent to May 1969. Each of those 45 contacts included inquiry specifically about community needs, issues and problems.

42. Based on its consultations with local leaders and members of the general public, Voice concluded that there is a need in Birmingham and surrounding communities for informed discussions on radio of community issues and problems. By and large, Voice found the people of its proposed FM service area to be vitally interested in a number of such issues. It observed that they look to radio for help in providing the exchange of information and ideas which will enable them better to cope with those problems.

43. Voice evaluated the chief issues and problems in the area at the time it made its survey to be: (1) race relations; (2) schools; (3) local government financing; (4) employment and industry; (5) housing; (6) transportation; (7) municipal merger; and (8) pollution. It described each problem in its evaluation, and also listed a number of other problems, which it deemed to be of somewhat lesser importance.

44. Voice also proposed broadcast matter to meet the community problems disclosed in its survey. Based on its consultations with local leaders and members of the general public, and on its knowledge of what is presently offered on Birmingham radio, it stated that it believes there is a need for public affairs discussion programs on which qualified spokesmen with varying points of view discuss topics of importance to the service area.

45. Such a series has already been instituted on WVOK, Voice's daytime-only AM station, to a large extent as a result of the survey. It has met with a large measure of success, and Voice plans to carry the same discussions on its FM outlet, under the same title, "Voice of Dixie." They will run Monday through Friday.

46. On FM, they would be broadcast after 9:00 p.m., when many of the local stations are off the air. The fifteen-minute taped discussion with a knowledgeable spokesman or expert would be followed by an invitation to listeners to telephone their comments and opinions on the matter under discussion. The call-in portion of the program would last 45 minutes.

47. While the first fifteen minutes of the program would ordinarily be taped rebroadcast of the "Voice of Dixie" program carried on the AM station that afternoon, there would be occasions on which the studio discussion would be conducted live for FM and the guest expert would then be available immediately afterward to answer listener inquiries.

48. Voice stated that the problems aired on this program would be kept timely. The eight problems evaluated by it as the principal community problems in Birmingham at the time of its survey had either already been aired, or were planned for airing, on its AM station. It proposed to deal with these problems, or similar problems current at the time of broadcast, on the planned FM station.

49. Voice considered the problem of race relations of such importance in the Birmingham area that it proposed on its new FM station

to carry a discussion or presentation on some phase of that subject each week. It said it would seek through this fixed forum to obtain a continuing dialogue between the races and an opportunity for airing of minor frictions before they develop into major incidents. These programs would be fifteen minutes in length, to be broadcast each Saturday morning at 10:00 a.m. They were programmed in response to a community need disclosed by the survey.

50. Voice stated that it did not intend in its choice of public affairs topics to be guided solely by suggestions made in its survey. For instance, drug abuse was seldom mentioned as a community problem in the survey. Yet, Voice said it viewed the subject as a potential problem of the first magnitude, which deserved early attention from a responsible licensee. Moreover, Voice said it is aware from its involvement in the community and with its people that parents in Birmingham are concerned with dangers to their children from drugs. Even though the subject did not figure prominently in its survey, Voice has aired discussions of symptoms of drug use and the dangers of drug abuse on station WVOK. It stated it would do so on its FM station as well.

51. Voice said it is also aware that crime is a community problem in its urban service area, notwithstanding limited mention in the survey, and it would program accordingly.

52. Voice proposed a policy of dealing also with community problems through regular news programming and public service announcements. For instance, it indicated it would broadcast appeals from local mills and other industries for workers when job opportunities occur, thus helping to address employment problems. It would carry spot announcements from state and local governmental authorities designed to relieve community tensions, thus helping to address problems of racial relations. In its news programming, it would seek to address community problems by airing items pertaining to problem areas.

53. Finally, Voice proposed specific agricultural programming, designed particularly to address the needs and problems of the large rural areas surrounding Birmingham.

Issue No. 6—First Security and Exchange Company

54. First Security submitted demographic information similar to that previously outlined herein and it will not be restated.

55. To ascertain the needs and interests of Birmingham and the surrounding service area, First Security has conducted four surveys. The first two surveys were conducted prior to the filing of the application. Those initial surveys, which included some 38 community leaders and some 50 members of the general public, focused on the needs and interests in terms of radio programming.

56. Following designation for hearing and with the articulation by the Commission of new survey requirements, First Security conducted a new community leader survey and a new survey of the general public. The community leader survey was conducted under the direction of First Security's President, Edward P. Ellis. In determining the groups to be surveyed, Mr. Ellis relied upon demographic material from the U.S. Census and the Jefferson County Chamber of Commerce. There were 99 community leaders interviewed, which included 9 Negro lead-

ers, and 14 women leaders. Seven of these were located outside the proposed service area, and reference thereto was stricken. Eighteen of the community leaders were in suburban Birmingham and then 32 beyond, in the small towns and rural areas that compose the proposed service area. Six of the leaders were under twenty-one, including both male and female high school students. There were 12 persons in the age group of 21–35 and 4 persons in the age group over 65 years of age. The interviews were principally conducted by Mr. Sumner Stewart-Magee, First Security Vice President, and Mr. Neal Miller, proposed general manager, with help from Mrs. Stewart-Magee; Mr. Dan Walker, proposed station sales; and Mr. Turpin, an employee of Mr. Stewart-Magee in whose presence and under whose direction Mr. Turpin conducted some 7 interviews. Mr. Ellis participated in some of the community leader interviews, and was in daily contact with Mr. Stewart-Magee as to the survey.

57. The 99 community leaders surveyed included representatives of the following groups:

Government.—Birmingham City Council; Birmingham Metropolitan Council; Housing Authority of Birmingham; Traffic Safety Coordinating Committee; State Unemployment Compensation Agency; Coordinator, Office of Mayor of Birmingham; Tax Assessor, Shelby County; Chief of Police, Pelham; Mayor and Police Chief, Calera; Mayor, Jasper; Mayor, Cullman; Mayor, Pell City; Mayor, Warrior; Alabama Merit System League; Alabama Joint Legislative Council; Director of Inspection for Birmingham.

Civic, Service, Fraternal and Charitable Organizations.—Alabama Jaycees; Shades Valley Jaycees; United Cerebral Palsy of Alabama; Frontiers International; Zonta Club; Birmingham Jaycees; American Red Cross; YMCA; PTA; American Field Service; Salvation Army; Community Chest; Birmingham Civitan Club; Greater Birmingham Safety League; Junior Civitan Club; Altrusa Club of Birmingham; Heart Association; Bessemer Association of Women's Clubs; Alabama League Humane Society; Spastic Aid; Shrine Temple; East Birmingham Civic Association; United Appeal; Toastmasters; Fraternal Order of Police; Downtown Club; Executive Director, Jefferson County Association for Mental Health.

Minority and Human Relations Groups.—President, National Association for the Advancement of Colored People; Alabama Council on Human Relations; Alabama Civil Liberties Union; Governor's Committee on Equal Employment; Southern Christian Leadership Conference; Voter Education Drive.

Business and Professions.—Alabama Association of Women's Lawyers; Alabama Federation of Business and Professional Women; Insurance; Young Men's Business Club; Law; Ministry; Judiciary; Birmingham Chapter of Alabama Certified Public Accountants; Social Workers; Television Station Operators; Banking; Management Consultant; Professional Engineers; Advertising; Real Estate; Agriculture; Better Business Bureau; and various other lines of commercial business activity.

Labor Organizations.—Secretary-Treasurer, United Mine Workers District #20; President, Birmingham Building Trades and Construction Council; Secretary-Treasurer, Birmingham Labor Council; Business Manager of Sheet Metal Workers Union Local #48; Secretary-Treasurer, Birmingham Building Trade Council; Business Agent, International Brotherhood of Electrical Workers.

Organizations for Family Assistance, Welfare, Manpower, and Economically Disadvantaged.—Executive Director, Family Counselling Association; Manager, Alabama State Employment Services; Community Service Council; Manpower Training Center; Jefferson County Committee on Economic Opportunity; Manager, State Unemployment Compensation Agency; Alabama Employment Security Specialist; Planned Parenthood League; Aid for Retarded Children Association; Rehabilitation Research Association.

Education and Youth.—Counseling Supervisor, Youth Opportunity Center; Educational Academic Scholarship Program, University of Alabama; Boy's Club; State Training School for Girls, Advisory Committee; Bob Jones University Board of Trustees; Mayor's Council, Youth Opportunity Member; National Honor Society; High School Marching Band and Mathematics Club; Youth Department of YWCA; Assistant Boy Scouts Executive; School Principals; Crestwood Youth Athletic Association Southside Boy's Baseball; Junior Civitan Club; French Honor Society; Birmingham Church Youth Groups; Girl Scouts; Civil Air Patrol; Alabama Educational Association; Neighborhood Youth Corps; University Hospital Junior Auxiliary; Little League Baseball; High School Yearbook Staff; Teachers; Governor's Council on Youth Opportunities; Alabama Educational Study Committee.

Religious Groups.—Avondale Methodist Church Social Concerns Committee; Dawson Memorial Baptist Church Sunday School; Alabama Christian Movement; Birmingham Baptist Minister Conference; United Methodist Church; Birmingham Presbyterian Youth Council; Beulah Baptist Church School; Woodlawn Church of Christ; Birmingham Sunday School Conference Board of Directors; St. Francis Xavier Church; Christian Community Center; St. John's Episcopal Church; First Methodist Church; Chaplain of Jefferson County Jail; Board of Birmingham Unitarian Churches.

Cultural Groups.—Birmingham Music Club; American Association of University Women; Birmingham Symphony Association; Birmingham Museum of Art; Arlington Historical Association; Women's Auxiliary of Patriotic Events; Birmingham Church Music Society; Bessemer Association of Women's Clubs; American Women in Radio and Television; Festival of the Arts.

Media.—Birmingham Association of Industrial Editors; Television Station Manager; Religious Programming for Television; Public Relations Council of Alabama; Theta Sigma Phi Journalism Sorority; Birmingham Advertising Club; Birmingham Press Club; National Public Relations Council of Health and Welfare Services; Public Affairs Director, Operation New Birmingham; Sigma Delta Chi Journalism Fraternity; Speakers Bureau for Birmingham.

Miscellaneous Organizations.—Goals for Birmingham, Chairman of Park and Recreation Board; Birmingham Unit, National Association of Social Workers; Goals for Birmingham, Government Task Force; Volunteer Bureau Committee; Birmingham Executives Club, U.S. Naval Reserves; Jefferson County Social Workers; U.S. Marine Reserves; Personnel Association of Birmingham; Governor's Alabama Prison Study Committee; Birmingham Navy League Council; American Association of Retired People; National Society of Professional Engineers; Retired Teachers Club; Fraternal Order of Police; Southern Anthropological Society; Alabama Academy of Science; Retired Teachers Association.

58. The community leader surveys specified literally hundreds of community needs and problems ranging from municipal government consolidation to air and water pollution, racial misunderstanding, drug and alcohol abuse, improved public rapid transit, youth recreation facilities, public housing, vocational training and manpower retraining, better teacher salaries, more recreation facilities, more facilities for the elderly and better law enforcement.

59. First Security also conducted a post-designation survey of the general public. The general public survey, conducted by Mr. and Mrs. Stewart-Magee consisted of 91 completed telephone calls in Birmingham and the surrounding area, of which 71 interviewees had opinions as to community problems. The community problems thus identified were substantially similar to those specified by the community leaders.

60. First Security proposes two weekly thirty-minute discussion programs devoted to governmental issues and activities. One of these programs would focus on the principal city of Birmingham, while the other program would concentrate on the communities surrounding Birmingham and throughout the applicant's service area. These

discussion programs would include appropriate governmental officials and would focus on many of the community needs as expressed in the survey; for example, consolidation of municipal governments and services, tax structure, public transportation, air and water pollution, representation of Negroes in local government, and race relations generally. These programs would be broadcast at times of greatest listener interest, probably during the early evening on weekdays.

61. First Security also plans a daily (Monday through Friday) fifteen-minute telephone discussion program. This would permit members of the public to voice their views as to community needs and issues. This program will serve to focus public opinion on community problems and will provide a continuing means for identifying community needs. Moreover, as to certain of the more specific needs—for example, a dangerous traffic intersection—the station would undertake a follow-up by bringing the matter to the attention of the proper governmental agency.

62. Also planned is a weekly half-hour discussion program which would emphasize social, economic, and health community needs and issues. For example, this program would serve as a means for informing the public and stimulating discussion as to welfare and public assistance programs, Social Security and Medicare, job opportunities and vocational training agencies and activities, drug use and regulation. This program would be broadcast on weekends to make it available as widely as possible. First Security also plans to broadcast on a weekly basis of approximately half an hour a speech or talk given to one of the area service or civic organizations. This might on occasion take the form of a broadcast of some meeting or proceeding of particular public interest. First Security also plans a thirty-minute round table discussion program where the public issues covered would be of a state, national, or international nature, which would be aired Sunday evening. Editorials will also be broadcast on occasion.

63. Concerning news, First Security believes, as a result of its surveys, that a total of ten hours and forty-eight minutes, representing some 6.7% of total air time, is warranted. Of the news, some 25% would be devoted to local news.

64. Concerning other programs, First Security proposes the following: A weekly thirty-minute cultural activity program which would feature different cultural interests such as music, art, drama, the goal being to acquaint the public with the programs of groups who promote such activities and to discuss new or interesting developments in these fields. Also, there would be a five-minute cultural calendar program carried three times a day which would publicize the various concerts, plays, art exhibitions, and other cultural events in the area. Also proposed is a weekly fifteen-minute program for review of recent books and periodicals, movies, and plays. This program would be scheduled late in the week to tie in with weekend activities. These programs would respond to the views expressed in the survey as to the need for the public to be aware of and to support the cultural opportunities which are available.

65. In the surveys there were also expressed several needs relating to the school system. First Security thus proposes a weekly fifteen-

109-045—73——13

minute program to permit discussion of such issues and to enable area school officials and teachers to communicate with parents and the public. Also proposed is a weekly half-hour program devoted to young people, to permit them to air their views on topics of their particular interest and to help to publicize such areas as job opportunities and training.

66. One group whose needs received considerable attention is the elderly and retired. Such needs would be met by many of the programs already specified. However, First Security proposes to schedule a weekly fifteen-minute program designed particularly for this age group and comprising such topics as health, recreation, leisure time activities, education, and travel. This program could make use of programs prepared by national associations of retired persons, as well as local senior citizen groups. Also proposed is a weekly fifteen-minute program in which members of various religious faiths compare and discuss religious topics and issues. Concerning agriculture, it is planned that the various discussion and other public affairs programs would include topics of interest to those who live in outlying areas. This would be particularly the case in the discussion program which will focus on the outlying communities and areas. Also, the discussion program relating to national topics would include subjects—for example, farm price supports—of particular interest in rural areas. The total of other programming thus aggregates three hours and twenty-five minutes.

CONCLUSIONS RE COMMUNITY NEEDS SURVEY

67. The foregoing indicates that each of these applicants has followed the requirements of the so-called "Primer Concerning Ascertainment of Community Problems," 27 FCC 2d 650, and has proposed broadcast matter designed to deal with those problems.

68. Voice challenges the survey of First, primarily on the grounds that Sumner Stewart-Magee, Vice President of First, and Neal Miller, under consideration as its General Manager, were not in fact on the payroll of First. It is understandable these individuals are not yet employees as First is not yet an operating station. In any event, the *Primer* (Question and Answer No. 11(a)) requires only that those conducting the community leader surveys be prospective management-level employees.

69. It is therefore concluded that each applicant has shown adequate compliance with the Primer requirements.

FINDINGS OF FACT, ISSUES 7 AND 8 (COMPARATIVE ISSUES)

70. The basic issues in the process of comparison are, first, the best practicable service to the public and, second, a maximum diffusion of control of the mass media. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393. An ancillary issue, arising from the independent programming proposed by First Security and the partial program duplication proposed by Voice with its AM station WVOK, is what benefits are to be derived from that proposed duplication (Designation Order, FCC 69–980, par. 6). There is no significant difference

in the size of the areas and populations proposed to be served and thus no issue in that regard (Designation Order, FCC 69–980, par. 7).

Integration of Ownership and Management

71. Voice of Dixie, Inc., a licensee of AM station WVOK at Birmingham since 1947, is owned by the Benns and Brennan families on a 50–50 basis. Mrs. Iralee W. Benns and William E. Benns, Jr., mother and son, each own 25% of Voice; of Iralee's corporate shares, half are held in her own name and half as executrix of her late husband's estate. As sole residual legatee under her husband's will, she eventually will personally own the entire 25% share.

72. The remaining 50% of Voice is held by Mary S. Brennan of Montgomery, Alabama, who is the mother of Daniel M. Brennan of Birmingham, a corporate director and full-time Program Director of WVOK.

73. Mrs. Iralee W. Benns is President of Voice and General Manager of station WVOK and will play the same role in the operation of the proposed FM station. Mrs. Benns is in her office daily and plays an active role in the business of the station, primarily in public relations and financing. In recent years, due to advancing years, she has delegated day-to-day programming and operational decisions to other staff members responsible to her, subject to her review and approval. Principal operational and programming responsibility has fallen on Daniel M. Brennan, Program Director and son of Mrs. Brennan, the 50% owner of Voice. Mrs. Benns has been a resident of Birmingham for 24 years and has been President and General Manager of WVOK since its construction in 1947, when she, her husband and son joined with the Brennans in putting that station on the air. Prior to that, she had been active in the management of station WFTM, Fort Myers, Florida, for two years as co-owner with her son. Mrs. Benns has been active in civic and church affairs, and in 1962 was named "citizen of the year" in Midfield, a small community adjacent to Birmingham in which the WVOK studio and transmitter are located, and she has served as President of the Midfield Chamber of Commerce. She has been an active promoter of Little League and Dixie Youth baseball, and the Little League field in Midfield is named in her honor.

74. Daniel M. Brennan, WVOK Program Director and second-in-command, represents the Brennan family interests on the operational staff of that station, and will continue the same role for Voice in the proposed FM station. Brennan also serves as station announcer, performs sales duties and news gathering. He also was responsible for the preparation of the instant application and was principal witness for Voice at the hearing. Brennan has been a resident of Birmingham for 24 years and helped in the construction of the original WVOK studio building. He served as part-time announcer during the first six months of WVOK's operation, subsequently becoming a full-time announcer. His full-time service to the station has continued ever since. His wife, Clara Brennan, serves a day or two a week on a regular basis as receptionist and secretary. Daniel Brennan is the station's member of the Birmingham Chamber of Commerce, and he has engaged in various civic activities.

75. William E. Benns, Jr., Secretary-Treasurer of Voice and corporate director, is a qualified radio engineer, and serves WVOK about one day a week in engineering and financing capacities and will serve the proposed station in the same capacities and amounts.

76. Mary S. Brennan, Vice President and Music Director of WVOK, is resident in Montgomery, Alabama, and participates in the management of WVOK, and would do the same for the proposed FM station, through reviewing trade publications and preparing music lists on a regular weekly basis, and making several trips a year to Birmingham to confer with the staff and attend directors' meetings. She also confers with Daniel M. Brennan, who makes personal reports to her on station operation.

77. First Security is a personal investment corporation, formed in 1965 by Edward P. Ellis, its President, Treasurer, and a Director. He owns 80% of the stock and votes the remaining 20% which is held in trust for his minor daughter, Harriet C. Ellis. The corporation engages primarily in real estate investments in Atlanta, Decatur and College Park, Georgia.

78. Edward P. Ellis, a native of Atlanta, Georgia, since 1957 has been an attorney in that city, and a member of a law firm, to which he devotes about 75% of his time. He has been active in many bar, banking, and civic activities in Georgia. He is also a director of a number of corporate enterprises, in one of which, Lease-All, Inc., he is also owner.

79. Mr. Ellis has been and would continue to be active in formulating the basic program format and guidelines of the proposed station, as well as the business and commercial aspects. He would select a General Manager who would complete the staff under Mr. Ellis' supervision. Mr. Ellis would be present at the station on the average of one day per week and would receive telephone and written reports from the General Manager, and would monitor the station's programming by tape or other means. Mr. Ellis has no prior broadcasting experience.

80. Mr. Sumner G. Stewart-Magee, Vice President and Director of First Security, has been a resident of Birmingham about five years and was formerly associated with Mr. Ellis in Atlanta. Mr. Stewart-Magee will devote a minimum of 15 hours a week to the proposed station, particularly relating to financial aspects and community relations. He has been active in church and civic affairs in Birmingham and Atlanta, and presently is a Director of the Downtown Birmingham Jaycees. He has studied engineering and is or has been a member of various engineering societies.

81. Mr. Kenneth B. McKenzie, Vice President and Director of First Security, will consult on financial matters, but will not otherwise participate in the operation of the station. The Secretary of the corporation is Peggy Vaughn, Mr. Ellis' secretary, who will not be active in station operations.

Duplication of Programming by Voice

82. First Security proposes independent programming, whereas Voice would duplicate a portion of its WVOK programming over the

FM station sought. The Commission accordingly provided for admission of evidence as to this duplication under the comparative issue. Compare, *Jones T. Sudbury*, 8 FCC 2d 360.

83. Voice would duplicate its WVOK programming over the proposed FM station, on Monday through Friday, from 12:30 p.m. to 2:00 p.m. and from 4:30 p.m. to sign-off of WVOK. As WVOK is a daytime-only station, that sign-off varies from 4:45 p.m. to 8:00 p.m., depending on the season of the year, and would result in duplicated programming over the FM facility ranging from a maximum of 18.8% in the summer to 6.6% in the winter. No AM programming would be duplicated on Saturday or Sunday. The reasons Voice proposes duplication are threefold: (1) The duplicated programs are considered by it to be of unusual merit; (2) Music of special appeal will be provided; and (3) Economy of operation will result.

84. Voice considers in the meritorious category "Southern Farm Review," "Voice of Dixie" and "Hal's Swap Shop," which are carried on WVOK from 12:30 to 1:15 p.m.; 1:15 to 1:30 p.m., and 1:30 to 2:00 p.m., respectively, Monday through Friday.

85. "Southern Farm Review" has been carried in its present format for many years with little change. It brings market quotations, and matters of interest and reports to the large rural area around Birmingham. Voice stresses that this program brings market quotations and other agricultural information during the lunch hour and is the only such service then available. A transfer of the program to FM has been considered, but in view of the larger coverage area of the AM station it will be continued on the latter.

86. "Voice of Dixie" provides a forum for authorities and spokesmen for different viewpoints on local issues and problems. A sample of programs over a ten-week period confirms the wide range of subjects of current interest and participation by community leaders. No other Birmingham station carries such programs on a daily basis. As the program involves substantial demands on the staff, Voice believes it should be aired more than once. Although constituting "duplication" under the rules, the program will in fact be rebroadcast via tape in the evening over the FM station, thus reaching a different audience.

87. "Hal's Swap Shop" was originated as the result of many calls and letters received by WVOK which resulted in this specific program in which a station announcer takes calls from listeners, or reads their letters, proposing articles for sale, trade or give-away, lost animals, and the like. The announcements are interspersed with musical selection, and Voice believes it desirable to give the listeners the benefit of the greater fidelity and listener enjoyment while bringing the FM listeners the same informational content.

88. Music of special appeal would be duplicated with WVOK from 4:30 p.m. to sign-off of the latter. Voice believes there is special appeal to the younger listening audience during these out-of-school hours of this programming consisting of contemporary music (pops, ballads, rhythm and blues, and rock), with country-western tunes and all-time standards. This type of music is not now available on

FM in and around Birmingham with its greater fidelity and listening enjoyment.

89. Economy of operation, the final reason advanced by Voice in support of duplication, is based on the judgment of its Program Director and his 22-years experience in Birmingham radio. Economic success of an FM operation in Birmingham, with substantial competition from AM and other FM stations, is dependent on achieving economies of operation such as would flow from a limited amount of program duplication. Other economies are expected to flow from the joint use of studio, record library, news car, news services and staff members, but the extent these would be related to duplicated programming is not shown.

Diffusion of Mass Media Control

90. None of the principals of First Security have other communications media interests. While Voice of Dixie, Inc. has no ownership other than WVOK in the mass media, both the Benns and Brennan families, owners of Voice, have such other interests.

91. Mrs. Iralee W. Benns is a 25% owner of Voice, half in her own name and half as executrix of the estate and residual legatee of her husband's interest, and also owns a 43% interest in WFLI, Inc., licensee of standard broadcast station WFLI, Lookout Mountain, Tennesse, about 130 miles from Birmingham, and is President and a director of that corporation. William E. Benns, Jr., 25% owner of Voice, is a 48% stockholder, Treasurer, and a director of WFLI. The 0.5 mv/m contour of WFLI extends into Alabama and is adjacent to WVOK's daytime 0.5 mv/m contour and there is overlap in that area to the extent of 462 square miles comprising 28,898 persons, of a total for than contour of 8,257 square miles and 1,004,779 persons.

92. William E. Benns, Jr. also owns 30 shares of the preferred (non-voting) stock in Deep South Broadcasting Co., licensee of daytime standard broadcast station WBAM of Montgomery, Alabama. Frances U. Brennan, widow of William J. Brennan and sister-in-law of Daniel M. Brennan, is owner of 60.8% of the voting stock of the licensee of WBAM, its President and a director. She also is co-trustee under the will of William J. Brennan of an additional 39.2% of its common stock. While William E. Benns, Jr. formerly held common shares and office in WBAM, he disposed of those interests pursuant to the Commission requirement in *Voice of Dixie, Inc. (WVOK)*, 10 FCC 2d 903, which approved a non-directional basis of operation for WVOK. Further, the books of WVOK carry $10,000 as the amount of a loan to WBAM, although testimony at the hearing indicates the loan was to William E. Benns, Jr. The terms of the loan and of its repayment were not disclosed. The record is clear, however, that Benns exercises no management or control of WBAM nor participates in any way in the management or operation of that station. It is equally clear that Frances U. Brennan exercises no control of the management or operation of WVOK.

93. The Brennan and Benns families have had other broadcast interests in the past. Thus, William E. Benns, Jr. was a 45% owner of the licensee of station WSLA–TV, Channel 8, Selma, Alabama, a station which was destroyed by fire in 1968, and which has been off the air since with the approval of this Commission. This station has been sold to Central Alabama Broadcasters, Inc., the application for approval of the sale was granted by the Commission, and the assignment was consummated on July 6, 1971. Likewise, Daniel M. Brennan, together with his brother Cyril G. Brennan, each formerly owned 5% of the ownership of the licensee of standard broadcast station WAPE of Jacksonville, Florida, but that license has been assigned to SIS Radio, Inc., in which neither the Benns nor Brennan families have any interest. In the nature of possible future interests, William E. Benns, Jr. holds a 49% interest in Integrated Broadcasting Company, Inc., an applicant for a standard broadcast station in Jacksonville, Florida, and his son, Robert A. Benns, is a 41% stockholder. That application is mutually exclusive with two other applications and is pending.

94. In Birmingham, there are presently eight AM stations and six FM stations, or a total of 14 aural radio services. Within the proposed 1 mv/m FM service area, there are 18 FM stations. There are also 51 AM stations, other than WVOK, which provide 0.5 mv/m service to all or a portion of the area. No portion of the proposed service area has less than eight aural services and some have as many as 23. Each of the 28 cities of 2,500 or more lying within the proposed FM service area receives in the daytime 2 mv/m AM service or 1 mv/m FM service from at least three radio stations other than WVOK, and all but one receives at least five. In addition, there are three TV stations licensed to Birmingham and a fourth to another community within the proposed service area.

95. Two daily newspapers are published in Birmingham and seven others at least weekly. There are also three daily newspapers and nine weekly newspapers published elsewhere in the proposed FM coverage area.

96. Lookout Mountain, Tennessee, is served by 0.5 mv/m coverage from nine AM stations other than WFLI; and four FM stations provide 1 mv/m service and three TV stations provide Grade B service to that community, a suburb of Chattanooga. It is also served by three daily newspapers and two weekly newspapers published in Chattanooga.

DISCUSSION AND CONCLUSIONS

97. It is apparent from the foregoing that each applicant has demonstrated its financial qualifications. Moreover, each has shown compliance with the *Primer* on the community survey and programming issue, 27 FCC 2d 650. To this extent, it is found that both applicants have shown they are fully qualified.

98. Applying the standards of *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, the comparison of these applicants becomes complex, as noted below.

99. Inasmuch as Ellis, 100% owner of First Security (20% as trustee for his minor daughter), has no other mass media interests, while owners of Voice do have other interests, it is apparent that First Security has a substantial preference under the standard of seeking to achieve the maximum diversification of control, a fact conceded by Voice. More will be said hereafter of the nature of the Voice media interests in the light of the subsequent findings that Voice, in turn, is entitled to a preference under the standard of integration of ownership and management.

100. A threshold question related to the integration issue is whether Voice may receive credit for management participation by Daniel M. Brennan as claimed by Voice, citing *Cleveland Broadcasting, Inc., et al.*, 7 FCC 2d 680, 697, or be rejected as urged by First Security, citing *Triple C Broadcasting Corporation, et al.*, 16 FCC 2d 357.

101. Daniel M. Brennan has been and is a key management figure for the past 22 years in the operation of WVOK and has clearly functioned as a representative of his mother, Mary S. Brennan, a 50% owner, who, while Vice President, a director, and Music Director of Voice, lives in Montgomery, Alabama, and performs virtually all of her duties there by way of preparation of the WVOK music programs on a weekly basis from her review of trade publications. Considering the long-standing family relationship, and in the light of *Cleveland Broadcasting, supra*, the Hearing Examiner concludes that Daniel M. Brennan's participation in WVOK and in the proposed FM station should be treated as representative of the 50% ownership of Mary S. Brennan.

102. Thus, the ownership of Voice is integrated into management as follows: Mrs. Iralee W. Benns (25%) is President and General Manager, and Daniel M. Brennan (Mary S. Brennan, 50%) is Program Director and "second in command," constituting 75% of the ownership interest involved in the daily management of Voice by local residents of the community with extensive records of community involvement and broadcast experience. Both Mary S. Brennan and William E. Benns, Jr. (son of Iralee W. Benns), who is owner of the remaining 25% of Voice, participate in the management and operation of Voice, but since this is part time and non-resident, Voice can receive no credit therefor under the *Policy Statement* standard.

103. As previously noted, First Security ownership is 100% nonresident and its principals are inexperienced in broadcasting. Ellis, the owner, resides in Atlanta and will be in Birmingham one day a week—75% of his time is devoted to his law practice, and only 25% to his personal investments of which the proposed FM station is but one of many. While he has an excellent record of involvement in professional and community activities in Atlanta, he has had none in Birmingham and will apparently be involved in none as he does not intend to reside

there. This is in sharp contrast to Voice, with the major portion of its ownership integrated into the management of both its existing station and the proposed FM station.

104. In view of the foregoing, a significant preference exists for Voice in the comparison of the integration standard.

105. The foregoing preference for Voice is possibly diminished somewhat by its proposed duplication of programming of WVOK. The amount of duplication is small, ranging from 6.6% to 18.8%. Of the three reasons advanced by Voice as to why there would be public benefit in such duplication, at least two sustain that position. The programs of unusual merit cited are: "Southern Farm Review," a long-standing WVOK program directed to the large rural areas surrounding Birmingham which brings farm news at the luncheon hour when such news is not available on other stations; "Voice of Dixie," a program devoted to local issues and problems and resulting from the community survey; and "Hal's Swap Shop" with its public service aspects. All appear meritorious and of a type that should not be denied either the AM or FM audiences. The music of special appeal, aimed at the young, is not available on any existing FM station, and hence, will bring to that audience for the first time that type of program in the greater fidelity of FM. The third reason, economy of operation, is not adequately explained. While there are obviously economies from joint use of studios, records, and other facilities, it is not clear what economies can be identified with the program duplication. In any event, it is concluded that the public benefits described at least offset the decreased efficiency resulting from the limited amount of duplication proposed and thus neutralize what might otherwise be a demerit in the evaluation.

106. It is accordingly concluded that Voice has a substantial preference with regard to its capability to render the best possible service to the public.

107. Confronted with a choice between two applicants, each with a substantial preference, the Hearing Examiner is of the view that Voice of Dixie, Inc. should prevail. The relative demerit of the First Security proposal, based on part-time participation by absentee ownership completely new to the broadcasting field, greatly outweighs the relative demerit of Voice's extension of ownership in the media field since the latter indicates no possibility of undue concentration of control in view of the many other facilities enumerated. In this connection, it is considered that the former interests and possible future interest in a Jacksonville station are not relevant to this evaluation. The proposal of Voice of Dixie, with the indicated overlap between WVOK and WFLI, where common ownership interests clearly exist, while undesirable from the standpoint of the diffusion of control standard, constitutes a much lesser threat to the public interest, convenience and necessity than does the entry of inexperienced, part-time, non-resident ownership.

ULTIMATE FINDING

108. In view of the foregoing, the Voice of Dixie, Inc. proposal would best serve the public interest, and the public interest, convenience and necessity requires that that application be granted and that of First Security denied.

Accordingly, IT IS ORDERED, That unless an appeal is taken to the Commission by a party or the Commission reviews the initial decision on its own motion pursuant to Section 1.276 of the Commission's Rules, the application of Voice of Dixie, Inc. (File No. BPH–6449, Docket No. 18664) is GRANTED, and the application of First Security and Exchange Company (File No. BPH–6610, Docket No. 18666) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
FREDERICK W. DENNISTON, *Hearing Examiner.*

F.C.C. 73R-233

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WESTERN COMMUNICATIONS, INC. (KORK-TV), LAS VEGAS, NEV. For Renewal of License	Docket No. 19519 File No. BRCT-327
LAS VEGAS VALLEY BROADCSATING CO., LAS VEGAS, NEV. For Construction Permit for New Television Broadcast Station	Docket No. 19581 File No. BPCT-4465

MEMORANDUM OPINION AND ORDER

(Adopted June 19, 1973; Released June 22, 1973)

BY THE REVIEW BOARD.

1. This proceeding involves the mutually exclusive applications of Western Communications, Inc. (Western), for renewal of its license for station KORK, Channel 3, Las Vegas, Nevada, and Las Vegas Valley Broadcasting Co. (Valley), for a construction permit for a new television broadcast station to operate on Channel 3, Las Vegas, Nevada. Now before the Review Board is a petition to enlarge issues, filed April 6, 1973, by Western, which requests that the issues in this proceeding be enlarged to include a meritorius programming issue with respect to programming at Stations KFSA, Fort Smith, Arkansas, and KOLO-TV, Reno, Nevada.[1]

2. By Order released June 12, 1972, FCC 72-503, 35 FCC 2d 517, the Commission designated Western's renewal application for Station KORK-TV for hearing on an issue to determine whether it had engaged in fraudulent billing practices by network clipping, as well as a misrepresentation and candor issue.[2] By order released January 8, 1973, FCC 73R-1, 38 FCC 2d 974, the Review Board, at Western's request, added a meritorius programming issue with repect to the programming at Station KORK-TV. The Board stated, however, that the effect of evidence adduced under this issue must be limited to mitigation of adverse findings under the fraudulent bill-

[1] Petitioner entitled its pleading a "Contingent Motion to Add Meritorious Programming Issue With Respect to KFSA-TV, Fort Smith, Arkansas, and KOLO-TV, Reno, Nevada." Also before the Board are the following related pleadings: (a) Broadcast Bureau's opposition, filed April 19, 1973; (b) opposition, filed April 19, 1973, by Valley; and (c) reply, filed May 1, 1973, by Western.

[2] A subsequent Order, released September 1, 1972, FCC 72-767, 37 FCC 2d 266, consolidated Valley's application with the KORK-TV renewal proceeding under the same issues and a comparative issue.

ing issue; evidence of meritorius programming would be of no decisional significance if the applicant should be found to have made willful misrepresentations to the Commission.

3. Western's present request for a second meritorius programming issue stems from the Board's action adding issues to determine whether Western engaged in fraudulent billing practices in violation of Section 73.1205 of the Commission's Rules and Regulations at commonly owned or controlled Stations KFSA–TV and KOLO–TV; and, if so, what effect such evidence should have on Western's *comparative* qualifications. Memorandum Opinion and Order released March 23, 1973, FCC 73 R–120, 40 FCC 2d 203. Petitioner now maintains that a meritorius programming issue should be added to the comparative aspects of this proceeding in order to avoid the "unfairness" that would result if only the unfavorable aspects of its commonly owned stations were to be singled out for consideration.[3] In support of its position, petitioner cites a line of cases in which meritorious programming issues have been added in order to afford an applicant the opportunity to mitigate the effect of adverse findings under existing basic qualifications issues.

4. In opposition, Valley contends that petitioner has cited no precedent for the addition of a meritorious programming issue where the comparative, as distinct from the basic, qualifications of the applicant are in question. Moreover, Valley maintains that the Board's action in *United Television Co., Inc.* FCC 70R–246, 19 RR 2d 625, limits the effect of evidence of meritorious programming to the mitigation of basic qualifying matters. Additionally, Valley asserts that in denying Western's motion to assign a burden of proof under the comparative fraudulent billing issues,[4] the Board reinforced the inappropriateness of adding a meritorius programming issue under these circumstances.[5] In its opposition, the Bureau alleges that Western's motion should be denied on two grounds: first, the fraudulent billing issues have been added only for comparative significance where in the past meritorious programming issues have only been specified with regard to issues that could result in the disqualification of a renewal applicant. Second, the licenses of KFSA–TV and KOLO–TV are not at stake in this proceeding and, therefore, the Bureau contends, the programming at these stations is not pertinent to this proceeding.

---

[3] As Western points out, it has filed an Application for Review of the Board's addition of the issues pertaining to possible fraudulent billing activities at the two commonly owned stations and, therefore, its present motion is contingent on unfavorable action by the Commission on the Application for Review.

[4] See FCC 73R–159, —— FCC 2d ——, released April 17, 1973.

[5] Valley quotes the following language from the Board's order:

"The issue added by the Board does not run to the basic qualifications of Western but rather to its comparative qualifications. In these circumstances, the Board has done no more than afford Valley an opportunity to introduce evidence which it regards as detrimental to the comparative qualifications of Western."

5. In reply, Western maintains that Valley and the Bureau have not come to grips with the rationale that supports petitioner's request: namely, that it would be arbitrary for the Commission to limit the inquiry into past broadcast record deficiencies without permitting the favorable aspects of past performance to be explained. Moreover, petitioner asserts that the Board's action in *Jack Straw Memorial Foundation*, 26 FCC 2d 97, 20 RR 2d 492, (1970) supports its requests in that the drastic sanction of disqualification need not be the only basis for the addition of a meritorious programming issue.[6] Petitioner also argues that, with respect to the *United* decision, the Board simply intended that "meritorious program evidence pertaining to rule violations that occurred after the last license period could not be considered as part of the renewal applicant's comparative showing, which was limited to the past license period." Finally, Western contends that if in denying a motion to ascribe the burden of proof the Board did no more than "afford Valley an opportunity to introduce evidence which it regards as detrimental to the comparative qualifications of Western," then fundamental fairness requires that Western be given an opportunity to offer evidence helpful to its comparative qualifications.

6. The Board will deny Western's request for a meritorious programming issue. In a recent opinion, *KFPW Broadcasting Co.*, 40 FCC 2d 126, 26 RR 2d 1633 (1973), the Commission held that evidence of meritorious programming was inappropriate in mitigation of adverse findings under a qualifying "bribery" issue. In doing so, the Commission stated the following:

> By the same token we believe that bribery of network officials *or any other acts involving moral turpitude relating to the operation of a broadcast station* would be sufficiently analogous to the misrepresentation situation to warrant similar treatment if proven. Once an applicant is shown to be untrustworthy due to evidence reflecting adversely on his personal integrity, a grant would simply not be appropriate no matter how meritorious his past programming had been. (Emphasis supplied.) 26 RR 2d at 1634.

In our view, allegations of fraudulent billing are sufficiently analogous to allegations of bribery of network officials (in that both involve acts reflecting on moral turpitude in the operation of a broadcast station) to compel the conclusion that the holding of the *KFPW Broadcasting Co.* case is applicable here. Although we are here concerned with only the comparative qualifications of the applicant, a logical extension of the Commission's rationale is that the assessment of a demerit should not be offset by evidence which has no meaningful relationship to the conduct in issue.[7] In short, since the Board

---

[6] In that case, a meritorious programming issue was added even though the maximum sanction was a short term renewal.

[7] It is possible that under some circumstances, evidence of meritorious programming may be relevant with regard to specified comparative issues. We agree with petitioner that our decision in *United, supra* is not determinative of that question and that *Jack Straw, supra,* does lend support to such a request.

is of the view that fraudulent billing involves that degree of culpable conduct which renders consideration of past programming as a mitigating factor inappropriate, the requested issue must be denied.[8]

7. Accordingly, IT IS ORDERED, That the contingent motion to add meritorious programming issue with respect to KFSA–TV, Fort Smith, Arkansas, and KOLO–TV, Reno, Nevada, filed April 6, 1973, by Western Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

---

[8] The Board notes that, in light of the Commission's decision in *KFPW*, and our discussion above, consideration of meritorious programming evidence as set forth in our order released January 8, 1973, *supra*, has been rendered moot.